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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, *Petitioner*,

v.

OVETA CULP HOBBY, *et al.*

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

THE INTEREST OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS

The Congress of Industrial Organizations (CIO) is a federation of labor unions, whose combined membership approximates six million. It is dedicated to the defeat of Communism through democratic processes.

A substantial portion of these members hold jobs that are covered by one or another of the government loyalty or security programs. Some are civilian employees of departments and agencies of the federal government, and are subject to the "Employees' Security Program," which is the Eisenhower Administration successor to the Truman Administration "loyalty" program involved in this case. A somewhat larger number of CIO members, running into the tens of thousands, are subject to the "Port Security Program" administered by the United States Coast Guard.

Still other tens of thousands, employed by private firms under contract with the Atomic Energy Commission, are subject to the personnel security clearance program of that agency.

An even larger number of CIO members, totaling some hundreds of thousands, are employed by private firms doing defense work under government contracts, and are subject to the security clearance program for such employees operated by the three defense departments of the federal government. Further, Attorney General Brownell has asked Congress to authorize the extension of this or a similar program to private industrial facilities which are important to national defense, but do not have direct contractual relations with the government. These facilities would, in the discretion of the Secretary of Defense, include not only utilities, such as telephones, railroads, and power plants, but also mines, mills and factories. If the Administration secures this requested legislation, virtually all CIO members—and the major portion of the industrial workers of the country—could be brought under some government loyalty-security program.

Finally, a small number of CIO members are subject to the loyalty-security programs of States or municipalities, or to those for military personnel administered by the military departments.

(Loyalty-security programs run by private industry without governmental intervention or participation are becoming more and more widespread, but we have ignored them in this Brief as presenting different legal issues from those raised by government loyalty-security programs.)

The CIO, as a labor organization, is directly concerned that the jobs and job opportunities of the members of its affiliated unions be not placed at hazard through procedures which are not consonant with the guarantees of the United States Constitution. Beyond that, we believe that these government loyalty-security programs, relying

as they do upon the statements of informers whose identity is kept secret from the accused and often from the adjudicating boards, pose a major threat to the constitutional liberties of all Americans, and to the very existence of our democratic system of government.

ARGUMENT

The CIO believes that no one can constitutionally be deprived of employment, pursuant to governmental action, where the deprivation of employment carries with it the stigma of disloyalty or of characterization as a security risk, except after a fair opportunity to rebut the adverse loyalty-security charges at a hearing. Where these charges are based on statements to an intelligence agency by secret informers unavailable for cross-examination, and whose identity is often not disclosed even to the board members, there is no such fair opportunity and the purported hearing is a travesty on our democratic processes.[1]

It is not our purpose to intrude upon the Court's time with legal arguments already made by petitioner and

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[1] We believe this to be an *a fortiori* case after *Wieman* v. *Updegraff*, 344 U.S. 183. There this Court unanimously struck down the action of the State of Oklahoma in requiring school teachers to swear that they were not, and had not within the past five years been, members of any organization on the Attorney General's "subversive" list. The Court based its decision on the principle that "indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power" and "offends due process" (at p. 191).

Far worse than classifying the innocent with the knowing is finding the innocent to be guilty on the basis of a sham hearing. We refer this Court to a pamphlet recently issued by the Denver Post, entitled "Faceless Informers And Our Schools," setting forth a number of cases in which school teachers were discharged on the basis of FBI reports to school officials based on statements of secret informants unknown to the teachers in question who steadfastly maintained their innocence. These teachers, unlike those in the *Wieman* case, were actually held guilty and discharged, not just placed in the same classification with guilty persons. We have supplied the Supreme Court Library with a copy of this pamphlet in case it should be requested by any of the members of the Court.

amici curiae. We do, however, believe that the Court should have available information as to the tremendous growth of loyalty-security programs and their ever-increasing spread to all parts of the country and virtually all walks of life.

We recognize, of course, that this Court will adjudicate in the present case only the actual controversy before it, which arises under the old Truman "loyalty" program. We believe, however, that for two reasons this Court should have before it, when it decides that controversy, adequate information as to the general nature and scope of the various government loyalty-security programs now in operation in this country.

In the first place, the Court's decision and, not less, its opinion, will inevitably carry implications as to the constitutionality of these other loyalty-security programs.

In the second place, and far more significantly, the scope of the loyalty-security programs throughout the nation bears directly upon the basic question presented in the case at bar. In the final analysis, what this Court is being called upon to do in this case is to balance two great national interests. On the one hand is the interest in the protection of government (federal, state and local), defense plants, port facilities, armed forces and international organizations against disloyal persons and security risks. On the other hand is the interest in the protection of the individual against loss of employment and reputation on the basis of statements of secret informers whom he never knows and never confronts. Certainly the extent of these loyalty-security programs and the injustices done in individual cases is relevant to this question of balancing great national interests.[2]

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[2] It had been our intention to set forth a portion of the great many cases that have come to our attention showing the injustices occurring through secret information given by unknown persons unavailable for cross-examination. In view of the excellent presentation of the Amer-

The Government itself presented this point to the Court in *Bailey* v. *Richardson*, 341 U.S. 918. At page 76 of the brief filed by the Solicitor General, the Government stated:

> "The harm to the individual must be weighed against the harm to the public. The problem is one of 'balancing the conflicting individual and national interests involved.' *American Communications Assn.* v. *Douds, supra*, p. 410. . . . disloyalty in the Government service under present circumstances is a matter of great public concern. And it was the informed judgment of the President and those charged by him with administering the loyalty program that in many instances disclosure of the identity of informants, and of investigative techniques and sources of information, would be strongly against the public interest."

We share the Government's belief that the issue in the *Bailey* case, as it is here, was one of weighing the harm to the individual against the harm to the public, of balancing individual liberty and national security. If only a few persons in highly sensitive positions were being subjected to the ravages of secret informants, one might conclude that the balance of national interest lay with the President's judgment that the security of the nation required the protection of these secret informants.[3] Now, however, that these loyalty-security programs with their secret informants, have spread to many millions of persons most of whose employment has no relation whatever to our

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ican Civil Liberties Union on this point, however, and our desire not to duplicate other material before the Court, we are limiting this brief to the general nature and scope of the various loyalty-security programs without reference to the individual cases where injustices have occurred.

[3] Of course, even here, the distinction might well be drawn between different categories of secret informants. An undercover agent of the FBI, for example, might be protected under many circumstances when the landlord, the school associate or village gossip ought not be protected.

national security, the balance of interest may and, in our opinion does, lie with the individual's right to an opportunity to rebut the charges against him before losing his employment and his reputation.

Therefore, in the discussion which follows, we undertake to supply the Court with a description of the general nature and scope of the various governmental loyalty-security programs in operation throughout the country.

The loyalty programs fall into two categories: those operated by the federal government and those operated by States or localities. We discuss them in that order.

I—FEDERAL LOYALTY-SECURITY PROGRAMS

As already indicated, *supra*, pp. 1-3, there are currently in operation five different federal loyalty programs, which apply to different groups of federal employees or to persons in private employment. The Fund for the Republic, Inc., has recently had prepared a survey of these programs, by Sandra Weinstein under the direction of Professor Ralph S. Brown, Jr., of the Yale Law School. With the permission of The Fund for the Republic, Inc., we have printed this study, entitled "Personnel Security Program of the Federal Government," as an Appendix to this Brief. It includes a description of the appropriate statutes, executive orders, and regulations.

While the five different federal loyalty-security programs differ in many respects, the most striking and relevant similarity among their procedures is the use by all of the different boards of investigative agency files containing statements by secret informers. These files are not shown to the accused and the identity of the informers is not disclosed to them. Usually, the identity of the informers is not known even to the members of the various boards. In the investigative files furnished to these boards the informers are identified only by symbol, such as T-1, T-2.

This practice of utilizing the unsworn statements of secret informers was permitted by the original Executive

Order 9835, creating the Truman loyalty program, which provided that

> "the investigative agency may refuse to disclose the names of confidential informants" (Part IV, section 2).

This decision was apparently taken because of the position of the Federal Bureau of Investigation that

> "practically none of the evidential sources available will continue to be available to the Bureau if secrecy and confidence cannot at all times be maintained with respect to the original source of information * * *" (See statement of the Chairman of the Loyalty Review Board, quoted in the Government's brief in the *Bailey* case at pp. 107, 108).

In view of the position taken by the Bureau and presumably by the other investigative agencies, the other loyalty-security programs have followed the provisions and practices under the original Truman loyalty program. Thus the Sample Regulations attached to Executive Order 10450 setting up the Eisenhower security program provide, *inter alia*, that

> "the Board shall reach its conclusions and base its determination on the transcript of the hearing, together with such confidential information as it may have in its possession."

In the case at bar, arising under the original Truman loyalty program, the pleadings make clear, and indeed the government in its answer alleges,

> "that the identity of confidential informants who had given information with respect to the charges against plaintiff was not disclosed to the plaintiff; that the identity of one or more such informants, but not of all such informants, was known to the Board; and that the information given by such confidential informants was not disclosed under oath" (R. 20).

We respectfully refer the Court to the Fund study

printed in the Appendix (hereafter designated as App.) for a detailed description of each of the five different federal loyalty-security programs. This Brief will be restricted to pointing out certain features of each of these programs which, we believe, will be of assistance to the Court in understanding their general significance and scope.

A. The Current "Employees' Security Program" for Civilian Employees of the Federal Government

The program which is now in operation for civilian employees of departments and agencies of the federal government is called the "Employee's Security Program." It was instituted by Executive Order 10450, of April 27, 1953, and applies to civilian employees of all of the departments and agencies of the federal government, including the military departments. In 1953 the civilian employees of the federal government totaled 2,302,932 (App. 29).

1. Genesis of the Present Program

The "Employees' Security Program" is an outgrowth of various earlier programs, including the loyalty program established by Executive Order 9835, of March 21, 1947, which is involved in this particular case. It is believed that a brief relation of this history will throw light on the nature of both of these programs. The history and operation of the various federal loyalty and security programs, up until 1952, is fully detailed in Bontecou, *The Federal Loyalty-Security Program* (Cornell, 1953), and the following summary is largely derived from that source.

a. *The Truman administration loyalty program.* In 1939 the Hatch Act was amended to forbid any federal employee

> "to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States." (53 Stat. 1148, 5 U.S.C. § 118j)

Sporadic attempts at enforcing this provision were made during the next few years by the Civil Service Commission, by the FBI, and by various of the employing agencies. See Bontecou, pp. 14-21. The Civil Service Commission, in particular, developed regular procedures for hearings and appeals within the Commission. (Bontecou, pp. 14-15.)

The first formal, over-all, systematic program for scrutinizing and adjudicating the loyalty of federal employees was, however, established by Executive Order 9835, 12 Fed. Reg. 1935. The details of this program are set forth in the Petitioner's Brief, and, in greater detail, in Miss Bontecou's book.

We call particular attention to the following features of this program:

(1) The Executive Order cited, as authority for its issuance, the Civil Service Act of 1883, 22 Stat. 403, as amended (without referring to any particular provision thereof); Section 9A of the Hatch Act (viz., the 1939 Amendment); and the authority vested in the President by the Constitution.

(2) The Order, as originally issued, provided that "the standard" for removal from employment

> " * * * on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." (Bontecou, p. 280.)

Subsequently, by Executive Order 10241, 16 Fed. Reg. 369, issued April 28, 1951 (Bontecou, pp. 281-2), the final clause of this provision was amended to read

> "there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

The present case arose after this amendment.

The Order then went on to list six categories of "activities and associations * * * which may be considered in connection with the determination of disloyalty * * *."

These categories were not changed with the amendment of the "standard."

(3) The Order itself set forth certain "loyalty determination procedures," which "shall be considered as providing minimum requirements." In addition it directed the head of each department to "prescribe regulations for the conduct of the proceedings before such [loyalty] boards."

b. *Summary dismissal statutes and "security."* Beginning in 1940, the year after the Hatch Act Amendment which eventually supplied the principal legal basis for Executive Order 9835, the military departments secured the enactment of statutes permitting the summary dismissal of their employees, in the interest of national security. See Bontecou, pp. 12-13. Typical of these statutes was the 1942 Act, 56 Stat. 1053 (quoted in Bontecou, pp. 289-290), which authorized the immediate removal of any employees of the War or Navy Departments or of the Coast Guard

> "whose immediate removal is, in the opinion of the Secretary concerned, warranted by the demands of national security * * *."

Whatever may have been the intention of Congress, the War Department did not interpret these statutes as according the employee the right to a hearing of any sort. Bontecou, pp. 13-14.

These earlier summary dismissal statutes were superseded by the Act of August 26, 1950, 64 Stat. 476, 5 U.S.C. § 22-1 (set out in Bontecou, pp. 290-292). This statute authorizes the head of each of certain designated agencies[4] to dismiss civilian employees "in his absolute discretion

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[4] The Departments of State, Commerce, Justice, and Treasury (with respect to the Coast Guard), the Defense Department and its component parts (Army, Navy and Air Force), the Atomic Energy Commission, the National Security Resources Board, and the National Advisory Committee for Aeronautics.

and when deemed necessary in the interests of national security." The statute provides that the President may extend it to departments other than the ones named in it if he deems it necessary in the interest of national security.

This statute further provides that permanent employees, or those holding indefinite appointments who have completed their trial period, and who are citizens, and whose employment is suspended under the Act, shall, after the suspension but before employment is terminated, be accorded certain procedural rights, as follows: (1) a written statement "of the charges against him" within 30 days after the suspension "which shall be stated as specifically as security considerations permit"; (2) an opportunity to answer the charges and to submit affidavits; (3) "a hearing, at the employee's request, by a duly constituted agency authority for this purpose"; (4) a review of the case by the agency head, or his designee, before any final decision adverse to the employee; and (5) "a written statement of the decision of the agency head."

c. *Merger of the Truman administration loyalty and summary dismissal (security) programs.* It will be noted that the procedures prescribed by the Act of August 26, 1950, are approximately the same as the loyalty program procedures established by Executive Order 9835.[5] The removal standard set out in the August 26, 1950, Act, viz., "in the interest of national security," does however differ somewhat from those successively promulgated for the loyalty program in Executive Orders 9835 and 10241.

Executive Order 9835 provided, in Part VI, paragraph 3, that it was not applicable to persons removed under the summary removal statutes. Nevertheless, the various departments having special statutory powers of summary dismissal tended, even before the Act of August 26, 1950, to merge their summary dismissal procedures with their

[5] For a detailed description of the procedures under Executive Order 9835, see Petitioner's Brief, pp. 15-18; Bontecou, pp. 35-73.

loyalty program, or, more accurately, to incorporate the former in the latter. With the passage of the 1950 Act, explicitly giving employees the right to a hearing, the last department operating under a summary dismissal statute, the Department of the Army, capitulated and agreed to process its cases under the loyalty program.[6]

2. Establishment of the "Employees' Security Program"

The "Employees' Security Program," now in effect for civilian employees of the federal government, was instituted by Executive Order 10450, of April 27, 1953, 18 Fed. Reg. 2489. Full details with regard to this program are set forth in App. 5-29.

In general the present program strongly resembles the Truman administration loyalty program established by Executive Order 9835. Thus:

1. Executive Order 10450 cites the same authority for its issuance as that set forth in Executive Order 9835, plus two additional statutes, viz. (1) R. S. § 1753, 5 U.S.C. § 631, which authorizes the President to "establish regulations for the conduct of persons who may receive appointments in the civil service," and (2) the Act of August 26, 1950, that is, the summary dismissal statute just discussed.[7]

2. Unlike Executive Order 9835, the present Order does not itself prescribe the procedures to be followed. Instead, it provides for termination of employment "in accordance with the said Act of August 26, 1950." As we have shown, however, (*supra*, p. 11), that Act prescribes procedures closely paralleling those of Executive Order 9835. The principal difference is that there is now no appeal to a

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[6] This merger of the summary dismissal procedures into the loyalty program operating under Executive Order 9835 is summarized in Bontecou, pp. 36-37.

[7] To justify this invocation of the latter statute, Executive Order 10450 provides that the provisions of that Act shall apply, in addition to the departments and agencies specified in it, "to all other departments and agencies of the Government". See *supra*, p. 11.

central loyalty review board, and the head of each agency and department is given the final power of decision. In addition, Sample Regulations were attached to the Executive Order and, as under Executive Order 9835, each department and agency has issued regulations detailing its procedures (App. 17).

3. The current Order sets forth as its "standard"

> "whether the employment or retention in employment in the federal service of the person being investigated is clearly consistent with the interest of national security."

The Order then goes on to state that investigations pursuant to it shall develop information which "shall relate, but shall not be limited, to the following:". There then follows a lengthy list of activities or associations of various sorts. Some of these relate to loyalty, and are similar to, or identical with, those set out in Executive Order 9835. Others are, however, considerably broader, and relate not to loyalty but to personal suitability and even to susceptibility to pressure. Thus, this portion of the Order reads in part:

> "(1) Depending on the relation of the Government employment to the national security:
>
> "(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.
>
> * * *
>
> "(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion."

3. The Finding of Guilt Under the Present Program

The thesis of Petitioner's Brief is that if the government establishes a procedure which has the appearance of a trial on the merits, and looks to the discharge of an employee on the basis of a determination of guilt "which ruins the reputation and career of the accused," then

due process requires that the hearing be a fair one in the accepted sense, and the determination may not be made arbitrarily. (Petitioner's Brief, p. 10.)

Petitioner's Brief relies primarily on *Wieman* v. *Updegraff*, 344 U.S. 183, in which this Court said (p. 190-191):

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy.'"

And the Court concluded:

> "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." (344 U.S. at 192.)

In the light of the language of the Court, and of the Petitioner's line of argument, it is worth noting that the current "Employees' Security Program," like the Truman loyalty program, does involve a system for discharging employees, after a hearing which has the appearance of a trial on the merits, on the basis of an adverse determination which ruins the reputation of the accused.

As regards the standard for discharge, it is more vague, but, we believe, an adverse finding under it is equally disastrous to the reputation, equally "a badge of infamy." The entire history of the transition from the Truman loyalty program to the Eisenhower security program indicates that the latter was simply an effort to "tighten up" the former. The finding which the Order requires for discharge, that retention is "not clearly consistent with the interest of national security," is itself highly derogatory. Further, the acts and associations which the Order lists as justifying an adverse finding are of types which are at worst infamous and at best injurious to the future career of the accused.

Finally, high government officials have repeatedly labeled employees discharged under the present program as "Communists" or "subversives" or as disloyal. Repeatedly they have made it clear that they consider discharge under the present program "a badge of infamy." Here are some typical statements (Italics have been supplied):

(1) *President Eisenhower:* "I repeat my previously expressed conviction that *fear of Communists actively undermining our Government* will not be an issue in the 1954 elections. Long before then, this administration will have made such progress in rooting them out under the security program developed by Attorney General Brownell that this can no longer be considered a serious menace. *As you already know, about 1,500 persons who were security risks already have been removed.*" (President Eisenhower Press Conference statement 12-2-53: New York Times 12-3-53.)

(2) *Attorney General Brownell:* "Fourteen hundred fifty-six persons have been ejected from Government service because they were found to be security risks . . . *We are going to have no more Communist infiltration in the Government and we steadily are getting rid of those who are security risks.*" (Attorney General Herbert Brownell at Chicago, 11-6-53: New York Times 11-7-53.)

(3) *White House Counsel Bernard Shanley:* ". . . 1,456 subversives have been kicked out of Government jobs since the President assumed office . . ." (Bernard M. Shanley, counsel to the President, in a speech to Advertising Club of New Jersey, 11-6-53: New York Times 11-7-53).

(4) *Senator McCarthy:* ". . . the new Administration has already rid itself of 1,456 security risks inherited from the Democratic Administration—*practically all of whom were removed because of Communist activities or connections or perversion.*" (Senator McCarthy on nationwide television program, 11-24-54.)

". . . Senator McCarthy . . . said flatly that '*90*

percent [of government employees] *were removed because of Communist connections and activities.'* "—(Marquis Childs in the Washington Post, 2-3-54.)

(5) *Mrs. Oveta Culp Hobby:* ". . . [Mrs. Hobby] said that when she took office she found 'little or no security program' except in the public health service. She recalled that the Eisenhower administration *has fired 1,456 persons who were regarded as security risks in all departments* . . . 'All cases handled under the previous loyalty program are being reexamined . . . *We are determined that every member of the department* must be reliable, trustworthy, of good conduct and character, *and completely loyal to the U. S.'* " (Chicago Tribune, 2-24-53.)

(6) *Postmaster General Summerfield:* "Almost 2,200 people who were security risks are no longer using your tax money. I am here to tell you we are not hiring any new ones. Somehow, I do not feel too amiably inclined toward *people who make treason a preoccupation.*" (Postmaster General Summerfield, quoted in Post Office Department Press Release on Speech to New York City Industrial Conference Board, 1-21-54.)

(7) *Senator (then Representative) George Bender (Ohio):* ". . . we have eliminated more than two thousand Communists and fellow travelers from important positions in the government of the United States. Every one of these jobs was obtained under the Democratic Administration." (Senator Bender (R., Ohio), press release, 1-15-54.)

In view of these statements of high government officials, it would hardly be open to the government to contend that discharge under the "Employees' Security Program" involves no invidious finding of guilt. In this respect, this program seems to stand on precisely the same footing as the Truman loyalty program which preceded it.

4. The Distinction Between Applicants and Employees

Both Executive Order 9835 and its successor Executive Order 10450 provide for security or loyalty screening of job applicants, as well as of employees. The screening of applicants may, however, involve simply an investigation, upon the basis of which the employing agency decides whether to hire. There is no required procedure of charges, hearing, appeal, and adjudication: indeed an applicant who is rejected on security grounds may never know that that was the reason for his rejection (App. 18).

B. Security Programs for Military Personnel

Civilian employees of the military departments are subject, like those of the other departments, to the "Employees' Security Program" just discussed. Military personnel, both officer and enlisted, are subject to other separate, though similar, programs.

These military personnel security programs do not have statutory authorization, but are governed by regulations promulgated by the Defense departments. A rather detailed description of these programs appears in the Appendix, pp. 41-50. In general, they resemble the "Employees' Security Program", both as to standards and criteria and as to procedures.

These military personnel programs do, however, have certain variations as regards draftees, which arise out of the fact that their service is involuntary. Thus, under these programs, volunteers are treated just as applicants for employment are under the "Employees' Security Program". That is, there is an investigation and if it results unfavorably they simply are not accepted (App. 43-4); there is no procedure of charges, hearing, appeal, and adjudication. The military departments apparently feared, however, that draftees might pretend to be subversive in order to avoid service. Accordingly they are treated like employees, rather than applicants, but with two variations from the "Employees' Security Program".

The first of these is that the burden of proof is reversed. Whereas the "Employees' Security Program" provides for retention only if "clearly consistent with the interests of national security", draftees are retained unless there is sufficient derogatory information to require discharge (App. 44).

The other difference is that if there is some derogatory information against a draftee, but not enough to warrant discharge, he may be retained in the service under controlled conditions (App. 45-6). Since all officers, both commissioned and non-commissioned, are deemed to hold sensitive positions, draftees in this twilight category have no possibility of promotion (App. 46).

There are at present something over 3,000,000 persons in the Armed Forces, all of whom are subject to these security programs. In addition, turnover in the Armed Forces, necessitates the induction of some tens of thousands of new persons each month, all of whom are covered by the programs. Thus, during the course of a few years these programs have application to may millions of persons.

C. Defense Contractors' Personnel Clearance

Probably the most important of all of the loyalty programs, from the standpoint of the number of persons affected, is that applicable to employees of defense contractors. This program, which is operated by the military departments, covers defense contractors' employees who use classified information, or have access to areas where classified production is carried on.[8]

Since 1950 about half a million employees have been cleared for top secret, secret, and confidential information, and an additional two million have been cleared for area access (App. 50). During the same period some 700 workers have been denied clearance. Currently about four

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[8] No distinction is made in this program between "employees" and "applicants for employment" (App. 51).

thousand employees are being screened monthly under this program.

This program is operated without statutory authority: each defense contractor agrees, as part of his contract, to abide by it. The current version of the program is embodied in Department of Defense Regulations, issued May 4, 1953.

The details of this program are set out in the Fund study (App. 50-53). In a number of respects it deviates considerably from the "Employees' Security Program".

One such divergence, and one of major importance to unions, is that the initial screening of employees who require only the lowest level of clearance, that is, who have access only to "confidential" material, is undertaken by the plant management. On the basis of its own beliefs or information, or of data supplied by the military, plant management determines whether there is "derogatory information" against the employee in question. The Fund study recited that, to handle this initial screening,

> "Many facilities have therefore had to establish large investigative staffs of their own or utilize detectives and credit agencies. FBI information is not available directly but it may come through the military department." (App. 51.)

If the management determines that there is "derogatory information" against an employee, the further handling of his case is turned over to the military department having security cognizance of the facility. In the case of employees requiring a higher degree of clearance, viz., access to top secret or secret information, clearance is handled by the military at the outset.

If the security office of the military department having responsibility for the facility thinks clearance should be denied, the case is forwarded to the appropriate Industrial Personnel Security Board. There are three of these Boards, each with a geographical jurisdiction. The eastern Board is administered by the Army, the central by the Air Force,

and the western by the Navy. This means, of course, that a loyalty-security case initiated by one of the military departments may go before a Board administered by another of the departments.

When a case reaches a Board, it goes first before a Screening Division of three members. If the three members unanimously favor clearance, it is granted and that is the end of the case. If they do not, a notice of denial of clearance, and of the reasons therefor, are forwarded to the employee. This notice parallels the "statement of charges" used in the "Employees' Security Program".

The employee may file an answer and, if not then cleared by unanimous vote of the Screening Division, may appeal to the Appeals Division of the Board. At this point he has the right to an administrative hearing, of the sort usual in the loyalty-security programs. These hearings are conducted like those under the "Employees' Security Program" and the same criteria are used as are used by the military departments under that program (App. 53).

There is no provision for any appeal from the decision of the Appeals Division. Apparently, however, the Secretary of the department concerned can intervene if he sees fit (App. 53).

A second major respect in which this program differs from that for government employees is that denial of security clearance need not mean dismissal for the employee, if the employer is willing, or can be induced by the union, to transfer the employee to work not requiring security clearance. It has been the experience of CIO unions, however, that employers lean to automatic dismissal.

This program, and the "Port Security Program" discussed *infra* pp. 25-27, may present a different constitutional issue than do the loyalty-security programs for government employees. Up at least until this Court's decision in *Wieman* v. *Updegraff*, 344 U. S. 183 the government

defended the constitutionality of the loyalty programs for federal employees upon the "facile generalization that there is no constitutionally protected right to public employment" (344 U. S. at 191). It is not perceived how this generalization was ever thought to apply, however, to employment in private industry.

D. Proposed Extensions of Loyalty-Security Programs to Other Industrial Facilities

As stated *supra* p. 17, the loyalty-security program operated by the military departments for certain employees of defense contractors—viz., those having access to classified information—does not rest on statutory authority, but on contract.

The McCarthy Investigations Subcommittee (of the Senate Government Operations Committee) in its final Report, just released, calls on the Defense Department to use its contracting authority to extend its loyalty-security program to all employees of government contractors doing defense work, whether or not the particular employees have access to classified information (DAILY LABOR REPORT, January 10, 1955, p. A-6).

This same Report likewise calls for the enactment of the "Defense Facilities Protection Act" which passed the Senate last year during the final week of the regular session (100 Cong. Rec. 14118), but did not come to a vote in the House. This bill (S. 3428, H. J. Res. 527, 83rd Congress, 2nd Session), drafted by Attorney General Brownell, authorizes the President to

> "institute such measures and issue such rules and regulations as may be necessary to bar from access to any defense facility or facilities individuals as to whom there is reasonable ground to believe they may engage in sabotage, espionage, or other subversive acts".

It further provides that any individual barred from access shall be notified in writing of the charges against him, and

be given "an adequate opportunity to defend himself * * * including, if he so requests, a hearing * * *". But the bill further provides that

> "Nothing contained in this Act shall be deemed to require any investigatory organization of the United States Government to disclose its informants or other information which in its judgment would endanger its investigatory activity: *Provided, however,* That in the event that such information is not disclosed the individual charged shall be furnished with a fair summary of the information in support of the charges against him."

Thus, this loyalty-security program, too, like those already in operation, would rely on secret witnesses, whose identity would remain unknown either to the accused or to his judges. Senator Ferguson, who introduced the bill, made that perfectly clear to the Senate. He said (100 Cong. Rec. 14116):

> "However, no hearings under the act will require that any Government investigative organization disclose its informants or other information if in its judgment disclosure would endanger its investigatory activity.
>
> "Mr. President, that is not an unusual provision. If it were necessary to give the names of informants or agents of the United States Government, and if the disclosure of those names or that information would endanger our investigatory activities in this field, naturally they would not have to be given. But the law does require that charges be specific enough to enable a defense to be made, despite the provision for protection of security information. In other words, if the Government does not wish to give the names or information which would lead to disclosure of the names, it must nevertheless give information specific enough so that the accused may be given an opportunity to answer. It would appear, on the basis of recent decisions involving the Magnuson Act, which

was taken to the upper court, that this would meet the requirements of due process.

"I cite the cases of *United States* v. *Gray* (207 F. (2d) 237, 241-242 (C.A. 9th, 1953)); *Parker* v. *Lester* (112 F. Supp. 433, 443-444 (N. D. Calif., 1953)); see also *United States* v. *Nugent* (346 U. S. 1), involving hearing procedures under the Selective Service Act."

To the same effect, see the Senate Committee Report (Report No. 1818), pp. 3-4.

The bill defines the term "defense facility" as having the same meaning as in Title I of the Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. § 781 ff., except that it is not to include vessels, piers, or waterfront facilities. Under the Internal Security Act of 1950 a "defense facility" is any facility designated as such under that Act by the Secretary of Defense (50 U.S.C. § 784 (6)), and he is authorized to so designate (50 U.S.C. § 782 (7)):

> "any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, * * * mine ,railroad, public utility, laboratory, station, or other establishment or facility, or any part, division or department of any of the foregoing."

Thus, the Defense Facilities Protection Act will, if it becomes law, authorize the application of a loyalty-security program to the great bulk of the nation's workers. And it will be a program of the type that is already so familiar: a derogatory adjudication upon the basis of a police file by judges who are not themselves trusted to know the names of the police informers.

E. Atomic Energy Commission

The Atomic Energy Commission operates a loyalty-security program applicable to, probably, several hundred thousand persons.[9] Some of these are employees of the

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[9] Gellhorn, *Security, Loyalty and Science* (Cornell, 1950), p. 82, states:

Commission itself, but most of them are employees of private companies who are constructing or operating installations under contract with the Commission. The same loyalty-security program applies to Commission personnel and to that of its contractors.

The AEC loyalty-security program rests on direct statutory authority (App. 53). The program is described in the Fund study (App. 53-58), and in more detail in Gellhorn, *Security, Loyalty and Science* (Cornell, 1950).

The AEC program differs from the "Employees' Security Program" in the following respects:

(1) The "standard" is phrased in terms of the danger to the common defense or security. It provides that the determination shall be one "which balances the cost to the program of not having his services against any possible risks involved." (Gellhorn, p. 86.)

(2) Since 1950 applicants as well as incumbents have been granted hearings under the program, in contrast with the normal practice as to government personnel (App. 57).

(3) The employee is given the right to challenge for cause the members of the Personnel Security Board which is to hear his case (App. 58).

(4) While only one hearing is provided, there are rather more layers of appeal. Thus the findings and statement of reasons of the Personnel Security Board are submitted to the Manager. The Manager then makes a determination and findings, which are given to the employee. The employee may then appeal to the Personnel Security Review Board, and submit briefs. That Board reviews the case and makes a recommendation to the General Man-

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"From January 1, 1947, to April 30, 1949, a total of 141,469 individuals were evaluated by the Atomic Energy Commission. During 1949 there arose a total of 37,561 new personnel clearance cases, and this number may sharply increase as new installations come into being."

We do not have any more recent data on the numbers of persons covered by this program.

ager. The decision of the General Manager is normally final, but the Commission itself sometimes considers important cases, such as that of Dr. Oppenheimer. It may be questioned whether this multiplicity of paper appeals is of any real benefit to the employee.

F. The "Port Security Program"

The Port Security Program is a loyalty-security program applicable to merchant seamen and shoreside personnel with access to waterfront facilities.[10] It is operated by the Coast Guard, with the cooperation and the participation of the maritime labor unions (CIO-AFL) and management. (Certain other unions, expelled from the CIO in 1949 as Communist-dominated, do not participate in the administration of the program or cooperate with it.) The Fund study estimates that this program affects more than half a million people (App. 58-59).

The present program is based on a statute enacted in 1950 after the outbreak of the Korean War (App. 59). This statutory program superseded a voluntary plan instituted by maritime labor (CIO-AFL) and management through the Department of Labor, and the Coast Guard (App. 59).

Every merchant seaman on deep sea ships is required by statute to have a federal certificate or license. Under the Port Security Program seamen who receive clearance are issued a new certificate or license, known as a validated document.

Clearance is denied if the presence of the worker "aboard vessels of the United States would be inimical to the security of the United States". The criteria (App. 59-61) are essentially the same as those of Executive Order 9835.

Since the program applies to all employment on ships

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[10] No distinction is made between "applicants" and "employees." In view of the sporadic nature of these types of employment, such a distinction would hardly be possible.

carrying the United States flag, a denial of clearance means that the worker is completely forbidden to work at his normal trade or calling. He does not have even the theoretical option of working at his trade in some private employment not covered by the program. And, his reputation destroyed by the denial of clearance, the possibilities of employment in another trade become more and more illusory.

In addition, the program applies to persons seeking access to designated waterfront facilities, which now includes all major port areas. Longshoremen and other workers covered by this part of the program, who do not have seamen's papers, are issued a "Port Security Card".

The initial determination of whether to grant clearance is made by a Coast Guard Marine Inspection Office, upon the basis of the FBI and the Office of Naval Intelligence (ONI) files. If clearance is denied, the worker is notified in writing and may then have recourse to the hearing procedures provided in the program.

As the result of union cooperation in the administration of this program, its procedures are substantially less unfair to the workers covered by it than are the procedures of any of the other loyalty-security programs. Thus:

(1) The initial hearing is before an Appeal Board, which is convened at one of the ports. The Board, unlike any of the other hearing boards, is tripartite in its composition. The chairman represents the Coast Guard, while one member is from management and one from labor. The management and labor representatives are chosen from panels supplied by the Secretary of Labor, and the labor member is normally from the same union as the worker (App. 62).

(2) The worker is informed in advance who the members of the Board will be, and what their business or union affiliations are. He may challenge any member of the Board for cause, and in addition he is given two peremp-

tory challenges, one as to the management representative and one as to labor. Further the worker may decide whether the replacement for the challenged member will be from management or labor, as appropriate, or from the public members of the panel (App. 62).

(3) The worker is supplied, in advance of the hearing, with a bill of particulars (App. 62).

(4) The worker may decide if the hearings are to be open or closed (App. 62). (Closed hearings are the rule under the other programs.)

(5) On the hearing record, and on the FBI and ONI files (undisclosed to the worker), the Board makes a recommendation, together with a statement of reasons, to the Commandant of the Coast Guard. If the Commandant's decision is adverse, the worker may appeal to, and have a hearing before, the "National Appeal Board" which sits in Washington. This Board also is tripartite, and the worker has the same rights before it as before the Appeal Board, including the same right to challenge.

(6) The National Appeal Board also sends its recommendation, together with its reasons, to the Commandant of the Coast Guard, who nominally still makes the final decision. In actual practice, however, the Commandant accepts the decision of the National Appeal Board.

G. International Organizations Employees Loyalty Program

Late in 1952 the Administration decided to apply the Federal Employees Loyalty Program to all United States citizens employed by, or being considered for employment by, public international organizations of which the United States was a member. To this end, President Truman, on January 9, 1953, issued Executive Order 10422 making the provisions, procedures and standards of Executive Order 9835 applicable in these cases.

The International Organizations Employees Loyalty Program created by Executive Order 10422 applies to

United States citizens employed in or being considered for employment in sixty-six (66) international organizations in which the United States participates.[11] These range all the way from such well-known international agencies as the United Nations, the International Bank for Reconstruction and Development, the International Monetary Fund, the World Health Organization, the International Labor Organization and the United Nations Educational, Scientific and Cultural Organizations, to such relatively unknown organizations as the Inter-Parliamentary Union For The Promotion of International Arbitration, the Postal Union of the Americas and Spain, the International Whaling Commission and the International Commission of the Cape Spartel Light.

As of December 10, 1954, 3,939 employees and persons seeking employment with over 40 international organizations had been processed under this program and there were 158 cases pending.[12] These proceedings were conducted by the International Organizations Employees Loyalty Board, which carried on investigations and held hearings not only in the United States but also in Rome and in Paris. The Board also scheduled hearings in Geneva, but they were called off when the Swiss Government refused the members of the Board permission to enter Switzerland.

Executive Order 10422 was modeled on Executive Order 9835. After Executive Order 9835 had been superseded by Executive Order 10450, Executive Order 10459, instituting the present international organization employees loyalty program, was issued on June 4, 1953. It provides that there shall be an International Organizations

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[11] Publication 3655 of Department of State, released February 1950.

[12] Resignation letter of Pierce J. Gerety, Chairman of the International Organizations Employees Loyalty Board, dated December 10, 1954, and released on December 17, 1954, by the U. S. Civil Service Commission.

Employees Loyalty Board of not less than three impartial persons. The Board is charged with the responsibility of inquiring into the loyalty to the Government of the United States of United States citizens employed, or considered for employment, by international organizations of which the United States is a member, and of making advisory determinations in such cases for transmission by the Secretary of State to the executive heads of the international organizations. The Board is directed to supply a written statement of the alleged derogatory information to the individuals concerned, to provide the individuals with an opportunity to answer or comment upon the statement of alleged derogatory information, to afford opportunity for hearing before the Board or a panel thereof, and to make its determinations upon all the evidence.

Executive Order 10459 provides that the employee is only to receive notice of such derogatory information "as security considerations permit," that the employee is given the right to cross-examine only those "witnesses offered in support of the derogatory information", that the Board is to base its decision upon all the evidence "including such confidential information" as the Board may have in its possession, and that the Board is to conduct its hearing in such a manner "as to protect from disclosure information affecting the national security."

The investigation of all American applicants created "a serious bottleneck in the recruitment of United States citizens by international organizations, particularly in the technical and professional fields." The international agencies turned to non-Americans since Americans were not immediately available for employment because of time-consuming investigations, and "delay in security clearances was sometimes unfairly misunderstood as a reflection upon the individual concerned." [13]

[13] Resignation letter of Pierce J. Gerety, Chairman of the International Organizations Employees Loyalty Board, dated December

II—STATE AND LOCAL ACTION

The past half dozen years have seen state and local governments following in the footsteps of, and at times even outdoing, the Federal Government in their loyalty-security programs. Many States and municipalities have adopted an all-embracing concept of security and have applied their loyalty-security programs to individuals whose work is even more remote from the national security than that of appellant in the case at bar.

The loyalty-security prairie fire which the Federal Government sparked has caught on in different communities in different ways. Whatever the method followed, it is today very difficult to find a State which still requires no more than the traditional oath of allegiance to the Federal and State Constitutions, and which does not, in some form and to some degree, inquire into the past and present affiliations of present and would-be jobholders. Such loyalty-security inquiries fall into three broad categories:

1. Programs analogous to that applied to federal employees under Executive Order 9835 and its successor, Executive Order 10450.

2. Public employees' loyalty oaths without specific programs of implementation.

3. Loyalty-security inquiries as an adjunct to state licensing and taxing power.

1. State and Local Programs Analogous to that Applied to Federal Employees [14]

Among the States and cities with loyalty-security statutes which may be considered as spiritual relatives of the

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10, 1954, and released on December 17, 1954, by the U. S. Civil Service Commission.

[14] Much of the following material has been adapted from a manuscript, thus far unpublished, written by Professor Ralph S. Brown, Jr., of the Yale Law School.

Federal program are the following: California, Florida, Georgia, Indiana, Louisiana, Maryland, Massachusetts, Mississippi, New Hampshire, New York, Ohio, Pennsylvania and Texas; Baltimore and New York City.

The Ober Law in Maryland (Flack's Annotated Code of Maryland (1951) Art. 85 A), the oath provision of which was interpreted and upheld by this Court in *Gerende* v. *Board of Supervisors*, 341 U. S. 56,[15] set the pattern subsequently followed by many other States. Under the Ober Law, all of the many state agencies are required to screen all applicants for state jobs to determine whether they are subversive; incumbents are to be similarly screened and are to be discharged wherever "reasonable grounds" exist for belief that they are subversive; an Assistant Attorney General is provided to enforce the Act; and private educational institutions which receive state aid must set up similar machinery for discovering subversives and discharging them from their staffs.

Florida, Georgia, Louisiana, Mississippi, New Hampshire, Ohio, Pennsylvania and Washington have all adopted the basic provisions of the Ober Law, establishing procedures for screening applicants and employees, and for discharging and denying employment to individ-

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[15] In this *per curiam* decision, the only issue before the Court was the denial to appellant of a place on the ballot for a municipal election on the ground of her refusal to file the loyalty affidavit required by the Ober law. The Court held that the affidavit requirement would be fulfilled by an oath that the affiant is not a person who is engaged "in one way or another in the attempt to overthrow the government *by force or violence*" (Emphasis is the Court's). As so interpreted, the Court held the requirement lawful. The Court did not have before it in the *Gerende* case, nor also in *Garner* v. *Board of Public Workers of Los Angeles*, 341 U. S. 716, any issue involving secret informers, non-confrontation, or any other aspect of due process in arriving at administrative determinations of loyalty or security.

uals as to whom there are "reasonable grounds" to believe them subversive.[16]

Under the California statute (Deering's Calif. Code (1953 Pocket Supp.), Government T. 1, par. 1028) all public employees are liable to dismissal for refusal to answer questions about past as well as present subversive affiliations. The investigating responsibility rests with the employing agency, but the administrative procedures are not spelled out in the law.

New York adopted the first out-and-out state "security risk" statute (65 McKinney's Consolidated Laws of New York, §§ 1101-1108 (1954 Cum. Supp.)). This law is administered by the State Civil Service Commission, which has the authority to transfer, suspend, or discharge employees in sensitive positions, and which is authorized to make use of the list of subversive organizations issued by the Attorney General of the United States. In addition, New York has the Feinberg Law (N. Y. Laws 1949, C. 360) upheld by this Court in *Adler* v. *Board of Education*, 342 U.S. 485, which authorizes the Board of Regents to use the Attorney General's List in determining the loyalty of New York teachers and which makes a teachers' membership in a listed organization a presumption of disloyalty.[17]

Connecticut provides that ". . . membership in subversive organizations as defined by the United States Department of Justice shall constitute cause for dismissal unless

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[16] Florida Statutes Anno. Ch. 876; Georgia Code Anno. Ch. 89, ss. 311-316; Louisiana Revised Statutes, Ch. 14, ss. 358-365; Mississippi Code Anno. ss. 4064-01 et seq.; New Hampshire Laws, ch. 180 (1953); Anderson's Ohio Revised Code, ss. 143-272; Purdon's Pennsylvania Stats. Anno. T. 65, Ch. 11; Washington Revised Code, Ch. 9.81.

[17] The *Adler* case is readily distinguishable from the case at bar in that full hearings were to be accorded both the organizations listed and the individuals charged. No issue was presented to the Court of secret informers or non-confrontation and for all that appeared to the Court in that case, the full hearing required by statute barred secret informers and provided for confrontation.

promptly disavowed by the employee." (Rule 17, Rules and Regulations and Related Statutes for State Classified Service). As in the case of California, the administrative procedures are not spelled out.

Indiana declares its public policy to be "to exterminate Communism and Communists and any and all teachings of the same" (Burns Indiana Statutes 10-5202), but gives no indication as to how this policy is to be effectuated.

Employees and applicants for employment with the District of Columbia Government are subjected to loyalty-security investigations and procedures which, in their essentials, are similar to those applicable to federal employees, although these procedures are not embodied in any formal document or order.[18] No doubt other jurisdictions have, by informal action, similarly put into effect loyalty-security programs analogous to the federal program.

Among the cities, in 1948 the School Board of Baltimore adopted a Resolution applying to school employees a loyalty program modeled after Executive Order 9835 ("State Government," February, 1954—publication of Council of State Governments). And in New York City the Mayor has authorized the Commissioner of Investigations to conduct a security clearance of all city employees (New York Times, March 26, 1954).

2. Public Employees' Loyalty Oaths

Among the States, territories and cities which now require their employees to swear that they are not subversives or members of subversive organizations are the following: Arkansas, California, Florida, Georgia, Idaho, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New

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[18] Affidavit in support of Motion to Dismiss the Indictment in *United States* v. *Marcus Singer*, Criminal No. 1150-54, United States District Court for the District of Columbia.

Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Washington, West Virginia, Alaska, Hawaii, Annapolis (Maryland), Detroit (Michigan), Los Angeles (California), and Wyandotte (Michigan). While there is no specific means provided for policing many of these oaths, there are nonetheless three effective penalties available: denial of employment to any person who, for whatever reason, refused to take such an oath; dismissal if administrative procedures indicate doubts as to the underlying facts; and a perjury indictment if any employee wilfully falsified his oath.

The language of these oaths varies. Some, like Texas and Detroit, make specific reference to the list of subversive organizations put out by the Attorney General of the United States. Some, as in Texas and California, make reference to past as well as present affiliations. Several, such as Arkansas, Idaho, Mississippi, Montana, Nebraska, Oregon and West Virginia, are patterned after the oath required of Civil Defense Workers by the Federal Government.[19]

Education has become the special beneficiary of loyalty oath requirements. Thus, in Rhode Island, a special oath is required of teachers, part of which states that:

> "I affirm, in recognition of my official obligation, that though as a citizen I have the right of personal opinion, as a teacher of the public's children I have no right, either in school hours, or in the presence of my pupils out of school hours, to express opinions

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[19] The pertinent part of this oath is as follows: ". . . . And I do further swear (affirm) that I do not advocate, nor am I a member or an affiliate of any organization, group, or combination of persons that advocates the overthrow of the Government of the United States by force or violence; and that during such time that I am a member of the (name of civil defense organization), I will not advocate nor become a member or an affiliate of any organization, group, or combination of persons that advocates the ov throw of the Government of the United States (or of this state) by force or violence. 50 USCA App. 2255(b).

> that conflict with honor to country, loyalty to American ideals and obedience to and respect for the laws of Nation and State" (Page 11, *Teachers' Oaths and Related State Requirements,* publication of National Education Association, June, 1949).

Georgia, in prescribing its loyalty oath, forbids its teachers from "teaching any theory of government or economics or of social relations which is inconsistent with the fundamental principles of patriotism and high ideals of Americanism." (Page 10, *Teachers' Oath and Related State Requirements*). As we have pointed out in the previous section, it is Indiana's public policy to exterminate all teaching of Communism.

The State of Alabama has adopted a law which forbids the use by any state school of any textbook:

> "which does not contain a statement by the publisher or author thereof indicating clearly and with particularity that the author of the book or other writing and the author of any book or writings cited therein as parallel or additional reading, is or is not a known advocate of communism or Marxist socialism, is or is not a member or ex-member of the Communist Party, and is or is not a member or ex-member of a Communist-front organization as designated by the U. S. Congress or any Committee thereof or the Attorney General of the United States" (Code of Alabama, T. 52, s. 433 (6a)).

A similar law is in effect in Texas (Vernon's Anno. Statutes, Art. 6252, s. 7).

Apparently without the benefit of a specific law, the Town of Shaftsbury, Vermont, has seen fit to ban books from its school library in cases where writers have been listed by the Attorney General of the United States as belonging to subversive organizations. (New York Times November 14th, 1953).

What has been the effect of these public employees' and teachers' oath requirements? In Pennsylvania employees of unquestioned loyalty who refused to take the oath

solely as a matter of conscience have been discharged from public employment. (Byse, A Report on the *Pennsylvania Loyalty Act,* 101 University of Pennsylvania Law Review 480 (1953).)

In California over 60 members of the faculty of the University of California either resigned or were dismissed because of refusal to take a loyalty oath, despite the fact that there was no evidence that any of this group were Communists. (Committee on Academic Freedom, Northern Section of University of Calif., Report of February 1, 1951.)

The National Education Association's Chairman of its Committee on Tenure and Academic Freedom quotes President (then General) Eisenhower as saying: "Ignorance of Communism, Fascism or any other police state philosophy is far more dangerous than ignorance of the most virulent disease. Who can doubt the choice of future Americans between statism and freedom if the truth concerning each be held before their eyes?", but questions whether any teacher would dare discuss such controversial issues at the risk of being called disloyal and dismissed from his position. (Foreword to *Teachers' Oaths and Related State Requirements*).

3. Loyalty Inquiries as an Adjunct to State Licensing and Taxing Powers

The "logic" which has dictated the federal loyalty-security programs and which has been followed with respect to state and local public employees, has been applied as well to employment dependent on licensing by the State —as consistency would seem to require. Examples of such government-imposed restrictions are the following:

In the Federal Government, the Federal Communications Commission indicated its plan to require non-Communist affidavits from every applicant for a commercial or amateur radio license. (New York Times, June 13, 1954.)

In Indiana professional boxers and wrestlers are re-

quired by the State Athletic Association to take a non-Communist oath. (New York Times, Oct. 22, 1954.)

In New York, the State Commerce Department refuses to list in its directory of summer camps any camp whose owner will not swear that his camp does not advocate subversive activities nor employ anyone who is a member of an organization on the list of subversive organizations put out by the Attorney General of the United States or by the Board of Regents of the State of New York (New York Times, Aug. 27, 1954).

In California, churches must take a loyalty oath if their property is to remain tax exempt. (New York Times, April 11th, 1954).

Texas has a loyalty oath for pharmacists (Vernon's Anno. Statutes, Art. 4542 a., s. 9).

The District of Columbia has held up licenses to a piano dealer and a liquor salesman on the basis of allegations relating to their loyalty (Washington Daily News, December 8 and 9, 1954).

A detailed study of the various loyalty tests for lawyers (Brown and Fassett, *Loyalty Tests for Admission to the Bar*, 20 University of Chicago Law Review, 480 (1953)) reveals that Alaska, Colorado, Kentucky, Oklahoma and Washington have all prescribed loyalty oaths as pre-requisites to admission to the bar. Indeed, in Alaska, Colorado and Kentucky the applicant must say that he not only is not, but also that he never has been, an advocate of overthrow of the Government by force or violence. Several additional States have loyalty questions in application forms which must be filled out to demonstrate that the potential attorneys are of good moral character. An extreme example is Hawaii, where applicants are asked:

> "If you were to be listed as a 'Communist' in the records of any federal investigative agency, what past actions or organizational affiliations of yours not already listed by you might be used by such investiga-

> tive agency to support its conclusions? In answering this question, assume that all of your past actions and organizational affiliations are known to such investigative agency."

Nor has the medical profession been altogether immune from loyalty inquiries. In New York two doctors who had been convicted of contempt for failure to produce the books of the Joint Anti-Fascist Refugee Committee to Congressional Committees, were suspended by the Board of Regents from the right to practice medicine. See *Barsky* v. *Board of Regents*, 347 U.S. 442.

An example of what has been happening in local communities is the requirement of the Harrison, New York, Board of Education that officers of any community organization wishing to use school facilities, as well as any guest speakers appearing in the school, must take a loyalty oath. (New York Times, August 30th, 1953.)

What began as a federal employees' loyalty program has thus found its way into all types of employment throughout the land, and continues to spread day by day to areas even more remote from security considerations than is told in the case at bar. We call the Court's attention in this connection to the opinion of the Pennsylvania Common Pleas Court in *Fitzgerald* v. *City of Philadelphia* No. 6212, September Term, 1952. Speaking for the Court, Judge Bok upheld the Pennsylvania Loyalty Oath statute, but made it clear that he was doing so reluctantly and only because the Supreme Court of the United States had upheld similar statutes. In the words of Judge Bok:

> "The loyalty or disloyalty of a ditchdigger or leaf raker would be so irrelevant to the safety of the state as to render the entire loyalty system not only absurd but oppressive . . . America was built on dissent and provocation and her answer to Communism lies in the effort of her citizens to achieve her moral purpose." (New York Times, May 5, 1953).

CONCLUSION

For the reasons stated in the brief for Petitioners and in the briefs *amici curiae*, it is submitted that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

PRELIMINARY STUDY
(Revised)

PERSONNEL SECURITY PROGRAMS OF THE FEDERAL GOVERNMENT

A Description of Statutes, Executive Orders, and Regulations

by

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under the direction of

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The United States government operates five distinct security programs.[1] They represent decisions that government employment, military service, defense production, atomic energy development, and shipping are vital security areas and that the employment of certain defined security risks in these fields must be barred. What follows is a description of those programs. It indicates the authority and standards under which they operate, the steps in the procedure and the chief similarities and differences to be found.

I. CIVILIAN AGENCIES

In the last years of the Truman administration, the majority of government employees were subject to both a loyalty and a security program. The loyalty program was established by Presidential Executive Order 9835, March 21, 1947, based on his powers under the Civil Service Act and section 9a of the Hatch Act. This section makes it unlawful for any person employed by the Federal government and drawing compensation under an Act of Congress to be a member of any political party or organization advocating the overthrow of the government by force or violence.[2] All employees of the executive branch were covered by this Order. The Security program derived its existence from Public Law 733, passed in 1950. This Act, which replaced World War II legislation applicable only to the military departments, permitted the

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[1] The government may also require a loyalty oath as a prerequisite to certain grants. Fellowships awarded by the Atomic Energy Commission are made subject to investigation even though the area of research is not classified. Recipients of National Science Foundation fellowships must execute a loyalty oath.

The program for investigation and clearance of the employees of the United Nations and its specialized agencies is beyond the scope of this memorandum. The United States government, by Executive Order 10422, Jan. 1953, as amended E. O. 10459, June 1953 established an International Organizations Employees Loyalty Board in the Civil Service. This Board transmits recommendations as to the employees' loyalty to the Secretary-General.

[2] A standard rider of every Appropriation Act since 1941 has been a prohibition of the use of money appropriated by the Act to pay persons who advocated or belonged to organizations that advocated the overthrow of the Government by force or violence. It is a felony for any such person to accept wages or salaries paid under the Act.

heads of certain designated agencies[3] to suspend summarily and to dismiss employees when national security warranted the action.

In 1951, the Interdepartmental Committee on Internal Security and the Civil Service Commission surveyed these programs at the President's request. They reported in 1952 that a government employee might be separated involuntarily under three standards, loyalty, security, and suitability. In practice, it was difficult to separate the three; some departments were already administering combined loyalty-security programs. A recommendation was made to create an integrated procedure covering all dismissal for cause. In view of the election results, nothing further was done.

Public Law 733 and Executive Order 10450

A new security program was promised in President Eisenhower's first State of the Union Message and established in Executive Order 10450, of April 27, 1953. The Order extended the operation of Public Law 733 to all executive agencies and departments. The Loyalty program was abolished, the Loyalty Review Board given 120 days to finish its work. The head of each agency and department was made responsible for his unit's program; central review was discarded. The Civil Service Commission is a record keeper and a surveyor, but is accorded no control.

The Order set out investigative requirements for government employees. It established a new set of criteria by which the results of such investigation were to be measured. These criteria combine indicia of disloyalty, pressure risk, other security risks, and personality suitability problems. The standard to which these criteria were to be applied is that the employment of the individual must be clearly consistent with the national security. National security is defined to include the "military, economic and productive strength of the United

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[3] The Departments of State, Commerce, Justice, and Treasury (with respect to the Coast Guard), The Defense Department and its component parts (Army, Navy and Air Force) the Atomic Energy Commission, the National Security Resources Board, and the National Advisory Committee for Aeronautics. The Office of Defense Mobilization absorbed the National Security Resources Board.

States." The definition appears in the Regulations, not in the Executive Order.

The procedural minimum is prescribed by Public Law 733. The Executive Order was silent on this point. The Sample Regulations recommended by the Department of Justice combined the standards and investigative requirements of the Order with an elaboration of the procedure required by Public Law 733. The Act and the Executive Order are, of course, binding on all agencies, but the sample regulations are not. They were, however, adopted, with some changes, by the civilian agencies of the government.

Public Law 733 allows the head of the agency "in his absolute discretion and when deemed necessary in the interest of national security" to suspend without pay any employee of the agency. The employee must then be notified of the reasons for his suspension, with whatever degree of specificity that security, in the opinion of the agency head, permits. He may show cause, in written statements and affidavits, why he should not be removed from his position. Employees who are citizens, with permanent or indefinite appointments past the trial or probationary period[4] are given, within thirty days of suspension, a statement of charges, a right to answer these charges in writing, and a further right to request a hearing by the agency.

Public Law 733 can, by its own terms, be extended to other departments than the ones enumerated if the President deems it necessary in the best interests of national security. Executive Order 10450 is based on this provision.[5]

Every agency and department of the executive issued regulations pursuant to the Executive Order. This section of the memorandum reviews nine sets of regulations in addition to

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[4] These qualifications are obviously derived from Civil Service Acts. The citizen, past probation, in permanent or indefinite appointment may, in a separation for cause, answer charges. The parallels will be developed in a subsequent section.

[5] The legality of the extension has been questioned. *Cole* v. *Young*, 125 F. Supp. 284 (D. C. 1954). The agencies listed in the Act were for the most part highly sensitive. In the *Cole* case, it was held in effect, that Executive Order 10450 is a finding that all government employment is sensitive. The President, when he extends the act to new agencies, is required to report to the Committee on the Armed Services.

the Sample Regulations of the Justice Department. Six civilian agencies have been sampled: the Post Office, the Veterans Administration, the Department of Health, Education and Welfare, and the Treasury, Justice and State Departments. The Post Office and the Veterans Administration account for 59 percent of federal employment outside the military departments. The regulations of the three military departments will be studied separately; while similar to the civilian agencies, they present unique problems and solutions. Almost 50 percent of all Federal civilian employees are in these three departments.

Criteria of Executive Order 10450

The Executive Order established these criteria as indicative of the existence of a security risk:

"1. Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

"2. Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

"3. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who ad-

vocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

"4. Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

"5. Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

"6. Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

"7. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States." (Executive Order 10450, sec. 8.)

(1) (iv) was amended August 4, 1954, by Executive Order 10548 to read:

> "Any illness, including any mental condition of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such cases."

An eighth criterion, refusal to testify before a Congressional committee about alleged disloyalty or other misconduct, under the protection of the fifth amendment, was added October 13, 1953, by Executive Order 10491.

Information raising security questions "shall relate but shall not be limited" to, the criteria of the Executive Order. The military agencies in their regulations have considerably elaborated upon these criteria, but the net effect is the same.

The Attorney General's List of Subversive Organizations

The Executive Order does not define "totalitarian, Fascist, Communist or subversive," nor does it refer to any other source

for definition. The agencies are not limited in these cases to the Attorney General's list. The Attorney General is to advise on the program under the Order and the list has been continued under the new procedure. Nonetheless, the employing agencies are free to make use of other lists or citations.[6]

The Attorney General's list originated under Executive Order 9835, which called for the Attorney General to designate those organizations membership in which would be an indication of disloyalty. The Department relied on the data then in its files and on any further investigation it thought necessary. Organizations were not informed that they were being considered for listing and no hearings were given to allow interested parties to contest the designation. The list was divided into those groups of Fascist, Totalitarian, Communist, and Subversive organizations which advocate force and violence to deny others their rights under the Constitution, and those which seek to alter the government by unconstitutional means. The criteria for listing were never made public. The list was not limited to presently functioning associations.

In the Joint Anti-Fascist Refugee Committee case, 341 U. S. 123, the Supreme Court examined the listing procedure and four Justices found it wanting in due process. The Department of Justice has issued new rules on the composition of the list. In an attempt to comply with the minimum prescribed by the case, an organization is given a notice of proposed listing. The organization may file a notice of contest of this proposal. If it does, it is then sent a statement of grounds for the listing and interrogatories to complete. No case has proceeded beyond this second notice stage thus far.[7]

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[6] Under the old Loyalty program, mere affiliation with an organization not on the Attorney General's list could not be considered. The security programs were not bound by this limitation.

A frequent source of names of organizations for use in these cases is the file of the House Un-American Activities Committee. Another is the lists compiled by the California Un-American Activities Committee, the Tenney committee.

[7] The Attorney General's list has both active and disbanded organizations in it.

The Attorney General, when re-issuing the list for use in the Security program, warned that membership in a group was only one factor that should be considered in a case. 18 Federal Register 2741, May 12, 1953.

Whether the employee is charged with being a member of a group on the Attorney General's list or of some other "subversive" organization he may as a matter of defense show he was innocent of the nature of the group. He may attempt to rehabilitate the organization, but his chance of success is small if it is on the Attorney General's list. He may, however, attempt to show that the group had a different character when he was a member.

Comment on the Criteria

Criteria (2) to (8) were in substance part of the previous loyalty and security program. They include acts illegal in themselves or indicative of a philosophy which, it is thought, would encourage acts against the good of the nation. They range from indications of imminent security risks to political risks, to varying affiliations and associations with security and the political risks, etc.

Of these criteria it is believed that the fifth has been most frequently encountered in security hearings. Some of its terms lack legal definition, though they may draw meaning from administrative practice. The terms used: membership, affiliation, sympathetic association—indicate that more than casual or intermittent patronage is meant; but the extent of participation which is suspect is not to be determined from the wording alone.

Paragraph (1) is the major change wrought by the Eisenhower program. It deals not with disloyal, traitorous or subversive activity, but with various reasons why an otherwise patriotic person may not be trusted to serve the nation. This criterion includes the blabber-mouths, the drunkards, the criminals—the unreliable. It also includes the individual who may be subject to blackmail, through a close relative in enemy hands, through his past or his habits.

There are few legal precedents for defining some of the component parts of this category. Perversion, unreliability, etc., import a variable moral standard. It would be difficult to have a uniform standard; excessive drinking to a teetotaller is not excessive to one who drinks. Subdivision (ii) (deliberate

misrepresentation) raises questions of materiality. Is this section limited to misrepresentation of facts otherwise relevant to security? Or is it disqualifying if a woman employee falsifies her date of birth? Subdivision (v) (pressure or coercion) pertains partly to matters outside the control of the employee. Does it make allowance for the ability of the individual to resist external pressure? These and many other ambiguities in the reliability criteria may be mitigated by the direction to consider the position the employee holds, and the effect his position could have on the national security. A drunken gardener, unlike a drunken State Department executive, need not be a security risk. All of the "loyalty" criteria, however, are treated as grounds for dismissal, whatever the actual security risk involved. Only when the facts raise no loyalty question is a strict "security" standard applied—that is, one which balances the sensitivity of the employment against the gravity of the charges.

Relation to Suitability Procedures

There is a recognized possibility that a security program which includes factors going to suitability might become a way to circumvent customary civil service procedures, especially when the character of the proof of unsuitability is not so substantial as civil service practice might require. The military departments warn, in the regulations covering civilian personnel and in the servicemen's security programs, that these programs are not a substitute for other administrative methods. The Sample Regulation lacks this provision, but a similar warning is found in the regulations of most civilian agencies. The warnings vary in emphasis, however. The Post Office states that Civil Service procedures are to be used to the maximum; the Department of Health, Education and Welfare says that cases remote from security will be processed normally under routine procedure; the Treasury says that security regulations are not to be used to the exclusion of normal procedure; the Veterans Administration provides only that nothing in the new regulations supersedes existing regulations. The Justice Department regulations make no reference to this problem.

Investigations: Pre- and Post-Appointment

An investigation is required for all new employees. Incumbents are investigated when "derogatory information," that is, information relating to the criteria, arises.[8]

The Executive Order divides all government positions into sensitive and non-sensitive, and the extent of the initial investigation of an appointee is determined by the classification of the position he is to fill. The Executive Order defines sensitive as a position "the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security." The head of the department or agency, or one to whom he delegates this authority, designates which jobs are sensitive. The Sample Regulations add that such positions include those wherein there is access to classified information and an opportunity to commit acts affecting national security. The civilian agencies, other than the Justice Department itself, include this addition in their definition. Indeed, the Treasury, which originally omitted it, amended its regulations to conform. The addition adds nothing which is not in the original definition but does illustrate it. The State Department has included all its employees in the sensitive category except any excluded by the Administrator, Bureau of Security and Insular Affairs.

The Executive Order says that the scope of investigation will be determined by the degree of adverse effect the holder of the position could have on the national security and proceeds to set as a minimum a national agency check and written inquiries. In practice, initial investigation seems to consist either of this minimum, or to involve a full field investigation. There is no middle ground.

Investigations for non-sensitive positions are usually made after the employee enters on duty. The Civil Service Commission will make an investigation of all employees entering the competitive classified service. The Commission will make the investigation of non-competitive employees for an agency with-

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[8] "Derogatory information" is a term developed under the old loyalty program. The Executive Order does not employ it but the Sample Regulations brought it back into the Security program.

out investigative facilities or for one with which it has an agreement to that effect.[9]

Investigations—National Agency Checks

These investigations consist of a national agency check and inquiry. The agency check is a search of Civil Service records, reports of the files of the Federal Bureau of Investigation, and of the investigative records of the Armed Forces where appropriate. Written inquiries are sent to law enforcement agencies in areas where the employee has lived or worked, to former employers and supervisors, to the references given, and to the schools attended. The addresses are drawn from the personal history statement which all government applicants must complete. The Justice Department requires a full field investigation even for its non-sensitive positions and the State Department makes the same requirement for any position it might designate as non-sensitive. Unlike the full field investigations conducted for sensitive positions, these are made after the employee enters on duty.

An applicant for Federal employment is required to complete Form 57. He lists the places at which he has been employed and the schools he has attended. He gives character references. Further, he must report on any foreign travel and the reasons for it. The applicant is asked about any arrests and any discharge from a job for misconduct. He is further asked if he is now or has ever been a member of a subversive organization and for explanation if the answer is affirmative. No list of organizations is given with the Form nor (until very recently) was there any reference to the Attorney General's list. For sensitive positions, further forms are completed. These will cover all past addresses, all schools, all groups of any kind to which the applicant has belonged.

Under the authorization of the Executive Order, the Civil Service Commission allows a lesser degree of investigation for

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[9] The military departments, State, Justice, Treasury, Agriculture and Post Office departments conduct their own field investigation.

per diem, temporary, or seasonal workers or for aliens employed outside the United States.[10]

Should this agency check and the inquiry develop any derogatory information, the Order requires a full field investigation or any lesser investigation which can allow a determination to be made. For a non-sensitive employee in competitive service or in an agency without investigative facilities, the Commission will make further investigation, limited to covering by personal investigation the adverse information developed. Seriously derogatory material is referred to the FBI.

The Commission will furnish a report of the agency check, the replies to written inquiries, and the report of any investigations made to the officer designated to receive them in the agency. If the written inquiries brought no response, the Commission will make no further attempts to obtain this information. If the Commission did the initial investigation for an agency which has its own facilities, the results of the national agency check and the inquiries are given to the agency, which may then develop any adverse report.

Full Field Investigations

If the position is sensitive, full field inquiry is normally made before the employee enters office. The Civil Service Commission will investigate competitive jobs unless the department head assumes the responsibility by law or agreement. If the position is not competitive, the employing agency investigates if it has the facilities; if it does not, the Commission does it on a reimbursable basis. If the employee has previously worked for the government and been the subject of a full field investigation, and if there has been no break in service over a year, the employing agency will determine the extent of the new investigation it desires.

In an emergency, so determined by the head of the department, a sensitive position may be filled for a limited period by

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[10] The Department of Health, Education and Welfare provides that no temporary appointment which has been made without investigation may be extended or renewed without the written approval of the Personnel Security Officer.

an employee on whom an investigation has not been conducted. The State Department sets a limit of ninety days. A national agency check may be made but this is not required. The incumbent of any position at the time it is designated sensitive may continue to hold it, pending completion favorably of investigation.

Executive Order 10450 requires that the file of anyone who underwent a full field investigation under the previous loyalty and security programs be reviewed and all cases readjudicated under the present standard if the former standard was less rigorous. Such a review may necessitate a new investigation.

If, in the course of any of these investigations, or by any other method, there is developed information pertaining to paragraphs (2) to (8) of the security criteria, or information that the person has been subjected to pressure to commit disloyal acts, the case is referred to the FBI for full field investigation. The FBI does not take cases involving only suitability factors. Further investigation of other kinds of derogatory information will be conducted by the Commission for agencies without facilities on a reimbursable basis.[11]

FBI files are checked in all investigations, agency or full-field. They are likely to produce derogatory information if any exists. The FBI scans the *Worker* and other publications it considers Communist or as having Communist leanings. It files the names of those mentioned as speaker, signer, or contributor in activities which it regards as Communist or subversive. It receives information from its own agents, from other law enforcement groups, from letters, anonymous and otherwise. It files the hearings and reports of the House Committee on Un-American activities. All this, and much more, goes into the file.

The full field investigation, whether conducted by FBI, Commission or military, is a comparatively complete study of the person, within the practical limits of time and money.

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[11] Much legislation creating agencies dealing with foreign aid or with national defense specifically required investigations to be made by the FBI. The Justice Department was swamped and requested a change in the law. Since 1952, the Civil Service Commission has conducted most routine investigations and only derogatory information is sent to the FBI for development.

In addition to the sources covered in agency and inquiries, it may cover credit agencies, minor party affiliations, other records. The investigator goes into the community and interviews the references, friends, neighbors, business acquaintances of the employee. They (the usual practice is to have a two-man team) will inquire into his habits, his opinions, his reputation. There is no precise definition of derogatory information at this stage. The investigating agency will collect and report to the employing agency almost anything which could reflect adversely on the employees, without comment or evaluation. Such a report contains largely derogatory information; the government is looking for danger spots. The FBI makes a summary report; its raw files, which include information on confidential advisors and methods of inquiry, are not available to the employing agency.[12] To protect an informant it considers confidential, the FBI will conceal his name and any data which might lead to his identification. It will evaluate his reliability to the extent of indicating whether he has given information which has been shown correct to the FBI's satisfaction in the past.

There are many delays in the investigative process. An FBI field check takes from four weeks up. A serious backlog may develop. In the State Department, there were at the end of 1953 over 5,500 cases waiting to be processed. Funds have since been reallocated to add investigators.

Security Office Evaluation of Investigative Reports

Each department or agency has a security office, which plays many roles in the clearance procedure. In most departments, the office is part of the administrative services; nonetheless, in its functioning, it tends to be almost autonomous. The office is usually staffed by career employees, with personnel or investigative experience. The Department of Health, Education and Welfare and the State Department have head-

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[12] Attorney General Brownell, in an interview, gave as reasons: the jeopardy to security of disclosure of sources or of investigative techniques, the harm to the innocent, the danger of educating the subversive in ways of evasion, and the fear of drying up sources. Newsweek, April 6, 1953, p. 24.

ing their security forces ex-members of the FBI, Mr. Schmidt in Health and Mr. McLeod in the State Department.[13]

The investigative reports go to the Security Office for preliminary analysis. All such reports go for evaluation in the Veterans Administration, the Post Office, Health and Justice departments. The sample regulations were not clear on this point; one section routed all reports to the Security office for evaluation, another required this only for information under criteria (2) to (8). The Treasury sends all full field reports and any other investigations with unfavorable information of any kind to the Security Office. Presumably, someone down the line must decide what information is unfavorable; but this initially is a mechanical determination. The State Department routes all reports through the Security Office but sends only those with derogatory information to the Administrator, who is responsible for the actual evaluation and recommendation.

The standards to be used by the Personnel Security Office in this evaluation are never discussed in the regulations. Presumably they are similar to the standards prescribed for the decision to suspend.

The civilian agencies make no further provision for the applicant about whom there is derogatory information; he is not processed under the regulations. Presumably the Security Office evaluation of an applicant is given to the employing office, with a recommendation. There is no requirement that the applicant ever be informed why he was turned down. Nonsensitive appointments are made subject to subsequent investigation; hence, the applicant will usually have become an employee before the investigation is made. He is thus afforded the procedural rights granted to an employee in his probational period. The applicant for a sensitive position will in all likelihood still be an applicant when investigation is completed.

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[13] The security officer in the State Department, known as the Administrator, holds a peculiar position. The Bureau of Security and Consular Affairs was created by Congress. Responsibility for personnel was later added to this Bureau. The personnel office was recently removed from the Bureau, but Mr. McLeod remains in control of security, of the Passport Division and of other offices.

The State Department specifies that the Office of Security may conduct or request further investigation, or may develop the information in hand by interview or written interrogatories. The Department of Health, Education and Welfare has similar provisions for inquiry. The regulations of the other agencies are silent on this point and the frequency of use of these pre-hearing devices has not been ascertained. Potentially, interview or interrogatory at this stage can do away with a need for further processing of a simple case and save both the government and the employee expense, effort and embarrassment. Potentially, too, it can be a form of threat, an indication to the employee that charges are forthcoming and that quick resignation would be in order. The value of the device depends not on its intrinsic merits but on the attitude of the department which utilizes it.

The Personnel Officer, under the Sample Regulations, forwards his evaluation and the file to whatever official the agency head has delegated his authority under the Act to suspend employees.

Suspension

The decision to suspend is the responsibility of a high administrative officer, not a security official. It is a rare administrator who would have the time for complete review of all files; the recommendation of the Personnel Security Officer must carry great weight. The Post Office and the Treasury departments allow some scope for decision to be made formally, as well as informally, by the Security office. The Post Office regulations require the Personnel Security Officer to forward the report and evaluation "if he deems suspension advisable" which by negative inference means he may close the case if he feels suspension unnecessary. This implication is further supported by a later section which specifically says that in his decision he is to be guided by the same standards which the suspending authority uses.

The Treasury Department explicitly puts the power to order suspension jointly in a Security Officer and a Legal Officer, who evaluate the reports. They decide what action, if any, shall be taken. If they consider suspension or reassignment appropri-

ate, they notify the head of the bureau who must follow their decision.[14] If they wish, they may call the bureau chief into consultation and abide by the majority decision.

In the Justice, Post Office and Treasury departments, suspension is formally ordered by the heads of component bureaus. The State and Health departments and the Veterans' Administration restrict this power to the head of the agency.

If the officer decides it is not necessary to suspend the employee, a written determination to that effect must be placed in the files.[15] The Sample regulations state that if there are "ameliorating circumstances" which are neither defined nor illustrated, and if the Security Officer approves, the employee may be transferred temporarily to a position where his presence would be consistent with national security. The regulations of the Veterans Administration adopt this provision in the words of the Sample. The Post Office, Justice and Health departments have no equivalent sections. The State Department includes, in a general warning against using the security program to the exclusion of other procedures, a statement that "interim action" should be used to "the fullest possible extent." This could authorize temporary change of position though there is no other mention of it. Since all positions in State are considered sensitive, the practicability of such a transfer can be doubted.

The Treasury treats reassignment as an interim measure open to the Personnel Security Officer and the Legal Officer. An employee who has been reassigned will then receive the

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[14] The Treasury regulations state that one of four actions may be taken, to

1. Retain the employee in his present position.
2. Suspend.
3. Transfer temporarily.
4. To find that continued employment is not clearly consistent with national security.

The fourth item is not a true alternative. If it is found that continued employment is not clearly consistent with national security, a further decision to suspend or transfer temporarily must be made. It is possible that if this fourth item is found, further investigation will be made before the second or third alternative is followed.

[15] This requirement may put pressure on the official to suspend. He may fear that he would be criticized if a future investigation should unearth his failure to suspend.

In the Post Office, whatever the decision, the file is returned to the custody of the Personnel Security Officer.

same notice which an employee of his status would receive if suspended. He may answer in writing and in affidavits. If, considering these documents, the Security Officer and the Legal Officer agree that the case may be closed favorably to the employee, they make this recommendation to the Secretary. If a favorable decision is not made, the Security Officer will order the head of the bureau to suspend the employee. The case is then treated like any other suspension case.

In deciding whether suspension is necessary in the interests of security, the officer should consider, among other things, the seriousness of the information received, the possible access to classified material which the individual might have in his position, and the opportunity to do harm which that position affords. The regulations make no attempt to prescribe respective weight to these elements or to indicate what other considerations might enter the decision.

Disposition Without Hearing

All employees do not have the same rights under Public Law 733. The United States citizen, serving under a permanent or indefinite appointment and past the period of probation, is entitled to an agency hearing; other employees are not.

The probational employee, the alien, the employee hired for a limited period, will be given, within "a reasonable time" after suspension, notice in writing of the suspension. Such notice is generally given in the name of the administrative officer having power to suspend, but some agencies have the Security Officer or some lesser official send it.

The notice is accompanied by a list of reasons for the suspension.[16] The regulations state these shall be as complete as security considerations, including protection of confidential sources, permit. This proviso has been broadly interpreted by the various agencies so that not only the names of informants but the details of the incidents involved may be concealed if it is thought such information might allow identification.

Within thirty days, the employee may submit such state-

[16] These are prepared in most units by the Security Office. In the Treasury Department, they are the joint product of the Legal Officer and the Security Officer.

ments in writing, affidavits or documents, as he wishes, to refute or explain the reasons given him with the notice. These papers are submitted to a Legal Officer, who may be specializing in Security work. The Post Office and the Veterans Administration route the reply through the Security Officer.

The Legal Officer or the Security Officer (both of them in the Veterans Administration) consider the answer for "sufficiency." This term is not defined. The Treasury adds that if the papers are deficient, the Legal Officer may allow correction.

The Personnel Security Officer and the Legal Officer review the file and the reply, if any was made.[17] They make a joint recommendation to the head of the department or agency, or individual recommendations if they are not in agreement. There is no provision in the regulations of civilian agencies for further investigation or inquiry at this stage.

The head of the agency is responsible for reviewing the file and the recommendations made. The extent of the review may vary with the size of the operation supervised, the nature of its security problem, and the personalities of the officials involved. Again, there is no mention of any independent questioning. The officer may make one of three decisions. If he finds that the continued employment of the individual is "clearly consistent" with the national security, he will reinstate the employee and compensate him for loss of earnings during this period. There is no provision for compensation for the expenses of defense.[18]

If he finds that continued employment in the present position is inadvisable, but that another position exists which the employee could fill without danger to security, he may transfer him to this job. This is to be distinguished from the tem-

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[17] The Justice Department requires the Deputy Attorney General, the legal officer in security cases, to consider also the employee's personnel file. This, coupled with the lack of any reference in the Justice regulations to other civil service procedures, might indicate that suitability cases are processed under security regulations.

[18] The costs of defense may be high. The employee should have an attorney. He may have to get copies of various records and documents. He may take depositions and get affidavits. All this may be expensive, and especially burdensome to a man who is suspended without pay. Many employees, it is said, resign rather than fight charges, for financial reasons.

porary reassignment pending administrative action which is in lieu of suspension. Permanent reassignment is at least a theoretical possibility in all agencies. The regulations emphasize that reassignment, rather than removal, should be used whenever possible. There is little evidence of any widespread use.

If there is no position available, or if for any other reason continued employment is not consistent with the security standard, the employee is separated from the department. He receives written notice of this decision from the administrative officer or the Security Officer. There is no appeal. Civil Service regulations for appeal of dismissal exclude security cases.

Charges Preceding a Hearing

The employee entitled to a hearing receives, within thirty days after suspension (as distinguished from "a reasonable time") a written "statement of charges." These, like the "reasons" which other employees get, are required to be as detailed as security allows.

The employee may answer in writing, in refutation of the charges. His documents are sent to the Legal Officer or the Personnel Security Officer, both of whom again consider them for "sufficiency."[19] The Post Office adds that if the Security Officer and the Legal Officer are agreed on a favorable recommendation, a hearing may be by-passed and the recommendation to close the case made to the Postmaster General. The Justice Department makes a similar provision.

The Post Office, State, Treasury and Justice departments state that the employee must request a hearing. Other agencies make no mention of this. They say, following the Sample, that a hearing "shall be given" but presumably one must ask before it will be given.

Hearing Boards

Hearing boards are composed of government employees, picked from a panel to hear a particular case. Agencies nominate their own employees to a roster compiled by the Civil Service Commission and draw from that roster employees of other units when a board is needed. This procedure is a prod-

[19] The Veterans Administration omits any reference to "sufficiency" at this stage.

uct of the regulations; neither the statute nor the Executive Order mention it.

In the Sample Regulations, nominations to the roster in the Washington area are made by the agency's Security Officer. Health and the Veterans Administration reserve this function to the head of the agency. The chief of a field office outside Washington nominates to regional rosters, according to the Sample. Many regulations are silent on this. The Post Office gives still another power to the Security Officer; he makes these field nominations also. The Treasury has the field heads submit nominations at the request of the Personnel Security Officer, who makes the final choice.

Nominees are required to be men of responsibility, "unquestioned integrity" and sound judgment. They have had full field investigations and no unresolved derogatory information exists against them. The Treasury adds that no nominee may be a security officer or an investigator. All nominations must be found to be "clearly consistent" with national security.

At least three members are chosen from this panel. None is employed in the agency conducting the hearing.[20] None may be acquainted with the employee. The military selection differs, as will be shown. Sample Regulations call for the head of the agency to make the selections from the panel. The State Department gives this task to the Administrator, Bureau of Security and Consular Affairs. The Treasury places the authority in the Legal Officer.

Of the agencies sampled, only the Treasury gives the employee the right to challenge a member of the board. The employee has one peremptory challenge and an unlimited number of challenges for cause. Rulings on challenge are made by the Legal Office which, of course, chooses the board in the first place.

A cautionary note should be sounded at this point. The regulations speak of "The Security Officer" or "The Legal Officer" or "The Head of the Agency" performing a function.

[20] It was hoped that this arrangement would eliminate personal prejudice and cut down fear of reprisal from the Security Officer. In defense of the older system in which each agency had its own board, it is argued that outside boards may have little knowledge of the problems of the agency where they are sitting, and that security decisions should consider the position of the employee.

This memorandum follows the terminology of the regulations. It is impossible to ascertain from the regulations the degree of delegation of authority that prevails. It is equally impossible to determine the extent to which an individual Security Officer or Legal Officer follows through the successive steps in a given case.

Conduct of the Hearing

The Security Officer usually prepares the case against the employee. The regulations call for the presence of a Legal Officer at the hearing but what he does and whom he represents there vary among the agencies. The Sample Regulations make him the representative of the head of the department. He aids the board in procedure and legal matters and advises the employee of his rights—but only on the request of the latter. This last duty is not his in the Justice Department. The Treasury gives him the responsibility of assuring that both sides are fully protected. He is repeatedly warned that he is not a prosecutor and is not to act like one. Equally often it is stated that the hearing is a fact-finding procedure and not a trial.

The hearing is opened by reading the charges and the answer, if any was made. The regulations instruct the Board to insure the employee full and fair consideration. Before or after the charges are read, varying with the agency, the Board informs the employee of his right to participate in the hearing, to have counsel, to offer witnesses or other evidence, to cross-examine any adversary witnesses who may appear at the hearing, and generally anything else the Board thinks he may need to know.

The general order of the hearing is controlled by the Board. The employee is allowed to control the sequence of presentation of his evidence. Generally, the agency presents its case first; this is mandatory under Justice rules and customary in other agencies. The department case is presented by the Personnel Security Officer.

The agency need never present a case; in practice, it rarely does. The hearing board has access to the case file and must consider it in reaching its decision. The Board may hear ex parte testimony of witnesses of whose existence the employee

may be unaware. It may consider any documentary evidence in the case—petitions bearing the employee's signature, books, articles and treatises he has written, previous testimony, etc. A statement that such evidence has been considered is included in the transcript, but the evidence itself is not. The agency may rest on the case it has built in the files; the hearing will be treated as an opportunity for the employee to defend himself and for the Board to examine and judge him.

After the agency has made its presentation, if any is made, the employee presents his case. He may call witnesses. He may present documents. He may testify in his own behalf. He gives his case in the sequence he thinks will be most effective.

All witnesses who appear at the hearing testify under oath. However, statements in the file need not be under oath and the board may hear testimony in executive session with or without oath. The Board may call witnesses, but it is not bound by their testimony and may cross-examine them. Even if the agency has subpoena power, it is seldom used.[21] There is no provision for witnesses' expenses.

Technical rules of evidence are not binding; the Board decides what it considers relevant to the issue. Study of transcripts of hearings will show that questioning often goes to political and economic beliefs, and that anything the Board feels has a bearing on the ultimate issue may be brought up whether or not it was contained in the charges.

The hearings are held in closed sessions. The Board is responsible for seeing that the hearing is conducted so that no confidential information is disclosed to unauthorized persons. Such information includes not only classified matter but sources of information or methods of investigation. In Justice Department hearings, the Security Officer confronts the employee only with evidence which in his discretion will not be inconsistent with "or in any way compromise" security. The Board is bound by his advice in all security matters in the hearing. He may preclude pursuing a line of questioning if it might divulge information to the employee.

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[21] Most exceptionally, a few witnesses called by the A.E.C. in the Oppenheimer case were under subpoena.

A verbatim report is made of the hearing. The transcript contains the preliminary papers and the testimony given at the hearing. The Sample Regulations stated that a copy of the transcript could be had by the employee at "a reasonable cost" but this provision was followed only by the Veterans Administration and the Post Office. Generally, the employee gets a copy free.

Decision and Review

The Board makes its decision on the basis of the file and the hearing.[22] Certain guides are given for considering the evidence. The Board is to take into account any handicap the employee may have had through inability to meet charges of which he was not told or to cross-examine or cast doubt on the credibility of witnesses whose names were not disclosed. The Board is also told that if a witness, not a "confidential informant," is called and does not appear, this can be considered; so may the fact that there can be no payment for expenses.[23]

The State Department regulations, as a general guide for all security decisions, establish two presumptions: a former course of behavior is presumed to continue until the opposite is clearly shown, and any doubts are to be resolved against the employee.

The decision is accompanied by a statement of reasons. Both are submitted to the head of the department or agency. They are advisory only.

The Sample Regulations provided that the employee receive a copy of the board decision (though not of the reasons). The regulations of the Health Department omit this provision; the regulations of the Post Office, Treasury and Justice Departments specifically provide against it. The State Department does give the worker a notice of the decision. The Veterans Administration gives the employee a statement of the decision and further (within security restrictions) a statement of the basic reasons for the decision. The Veterans Ad-

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[22] The Justice Department provides that if the employee fails to appear at the scheduled hearing, the Board will consider the case on the record.

[23] "Confidential informant" is never defined. It is not limited to FBI undercover agents or similarly situated persons but may include anyone who does not wish to be identified to the employee.

ministration does not elaborate on what this statement includes and how far beyond a general conclusion it would go.

The entire file, including the hearing record and the opinion of the Board, is forwarded to the head of the agency. (The Treasury Department sends the file though to the Security Officer and the Legal Officer for another review and recommendation); he is supposed to review the entire case. There is no provision for appeal by the employee nor for further investigation at this stage. A written decision is then made, to reinstate, to transfer or to remove, and the employee is notified of this decision. The regulations do not indicate whether the agency head in fact delegates his review.[24]

There is no central review board, as there was under the Loyalty Program. The Civil Service Commission is required under the Executive Order to make a continuing study of the manner in which the program is being operated, to look for deficiencies in security protection and any tendency to deny employees their rights. It is to report at least semi-annually to the National Security Council, with recommendations for revision or legislation. It also furnishes information about any department deficiencies to the head of the department immediately, for such correction as he might make. A small unit in the Commission has been established for this function. A central security investigations index is also maintained by the Civil Service Commission.

In accordance with a presidential directive of 1948, all records and files are to be kept fully confidential to preserve informational sources and to protect the employee. A subpoena or other demand from a source other than the executive branch is to be "respectfully declined" and referred to the office of the President. Access to FBI raw files is given neither to other executive agencies nor to the legislature.

Eligibility for Reappointment

Public Law 733 said that termination "shall not affect the right . . . to seek or accept employment in any other department or agency of the government" provided that the Civil Service Commission determine that the employee was eligible.

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[24] The Veterans Administration provides that the Administrator give, with the notice, the basic reasons for the conclusion reached.

Since the law originally covered only selected agencies, such reappointment was more of a possibility than it is now. The Executive Order shifted the emphasis and added a requirement. The employee will not be appointed in the same or another agency unless the Civil Service determines eligibility and unless the head of the appointing agency finds that such employment is consistent with the national security.

II. MILITARY DEPARTMENTS

The military departments of the government operate three security programs, one for civilian personnel, one for military personnel and one for industrial facilities and their personnel. These programs are not based on the same authority. They do not cover the same areas nor deal with the same problems. Yet, they are alike in spirit, in standards and in procedure.

CIVILIAN PERSONNEL

The program for civilian personnel operates under Public Law 733 and Executive Order 10450. In 1953, the Defense departments employed 1,148,745 out of a total Federal Government employment of 2,302,932.[24a]

The Defense Department issued a general directive and the constituent departments issued regulations governing their own forces. The regulations are highly detailed. They prescribe administrative steps far more elaborately than civilian agency regulations do. Military channels are carefully preserved. Nonetheless, the programs are basically the same as those under which civilian agencies operate and only the differences need be emphasized.

Criteria

The Defense Directive criteria include all those of Executive Order 10450 but add these refinements:

> "8. Participation in the activities of an organization established as a front for an organization referred to in subparagraph 5 above [subversive organizations] when his personal views were sympathetic to the subversive purposes of such organization.
>
> "9. Participation in the activities of an organization with

[24a] The Defense Department includes the departments of the Army, Navy and Air Force and the Office of the Secretary of Defense.

knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of or sympathetic to the infiltrating element or sympathetic to its purposes.

"10. Participation in the activities of an organization, referred to in subparagraph 5 above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

"11. Sympathetic interest in totalitarian, Fascist, Communist, or similar subversive movements.

"12. Sympathetic association with a member or members of an organization referred to in subparagraph 5 above.
(Ordinarily this will not include chance or occasional meetings, nor contacts limited to normal business or official relations.)

"13. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in subparagraphs 2 through 11 above. A close continuing association may be deemed to exist if the individual lives at the same premises as, frequently visits, or frequently communicates with such person.

"14. Close continuing association of the type described in subparagraph 13 above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

"15. The presence of a spouse, parent, brother, sister or offspring in a nation whose interests may be inimical to the interests of the United States or in satellites or occupied areas of such a nation, under circumstances permitting coercion or pressure to be brought on the individual through such relatives.

"16. Willful violation or disregard of security regulations.

"17. Acts of a reckless, irresponsible or wanton nature which indicates such poor judgment and instability as to suggest that the individual might disclose security information to unauthorized persons or otherwise assist such persons, whether deliberately or inadvertently, in activities inimical to the security of the United States."

Items (8) to (14) may be considered as an elaboration of paragraph (5) of Executive Order 10450, sec. 8, or perhaps they create independent grounds for rejection. (15) is the

classic example of 1(v), the pressure risk. Making it a separate category may divorce it from the limitation of (1) that it be weighed according to the position of the employee. (17) can be encompassed in 1(i), but the separate expansion may indicate some special import to the Defense Department. (16) merely makes a separate class of what was a phrase of (6) in the Executive Order.

The directive recognizes that because of this enumeration and elaboration on the basic criteria, all the classes are not of the same "seriousness." The regulations of the military departments do not follow these criteria precisely, but the variations are unimportant.

The departments do not limit subversive groups to those on the Attorney General's list. That list is set forth in the loyalty certificate for military personnel and the similar certificate of non-affiliation for civilian personnel; but the employee is apparently expected to disclose any subversive affiliation, whether or not the organization is on the list. Failure to disclose membership is itself grounds for charges. The list is posted conspicuously at all military establishments.

The regulations, furthermore, specifically indicate that nonlisted organizations may be considered, though the Air Force notes that the Attorney General has advised that "mere" membership, affiliation or association with an organization not designated by him should not be considered relevant unless the department obtains and makes available to the adjudicator the Attorney General's views on the organization. There is no indication, however, that other departments follow this advice. The Navy permits the citing of organizations mentioned by other government agencies if there is information available sufficient to evaluate it.

The military regulations all refer to the Attorney General's statement that membership in an organization is only one factor to be considered. The Navy and the Air Force counsel the adjudicator to consider the employee's reasons for joining the group and his knowledge of its purposes.

The Defense directive quite clearly states that these regulations should be limited to true security cases. Maximum use is to be made of normal civil service removal when security is

not a consideration and the procedure is adequate and appropriate. This is repeated by the constituent units. However, both the Army and the Navy indicate the reverse implications of this provision. If the information is not of a status to sustain civil service action, it will be processed under security regulations. The Navy adds that action may be taken through suitability procedures even if the security decision was favorable.

Categories of Sensitive Positions.

The Defense directive distinguishes three types of position, two sensitive and one non-sensitive. The definition of "sensitive" is not changed. However, a separate category is established, consisting of those responsible for war plans and policies, for over-all defense programs, and certain other sensitive positions. The Army calls this top sensitive classification "sensitive-critical" and includes in addition to those mentioned all having access to Top Secret classified matter, all grades above GS-14, and all members of screening and appeals boards. The Navy includes in top sensitive all having access to any classified matter. The bottom sensitive group consists of all other positions which are designated sensitive.

The Air Force has three sensitive levels—the war plan level, a second level including those with access to Top Secret, cryptographic or security clearance material, and a third level which includes those having access to Secret or Confidential matter, those training personnel, and those in public relations. Included also in this lowest level are those working in areas which contain classified matter (but who are without authorized access to it), and who have a real opportunity to commit sabotage or espionage.

It was brought out in hearings of the Senate Committee on Armed Services, July 15, 1954, that some incumbent employees and all applicants for Army employment are now required to execute a certificate of non-affiliation with certain organizations. Incumbents in sensitive positions must sign. If they refuse or invoke the Fifth Amendment, they are deemed a security risk. Applicants for any position not exempted from investigation must fill out this form. If they refuse or invoke

the Fifth Amendment, they are denied employment. If they complete the forms and the information given raises a security question, appointment will not be made prior to a national agency check.

Investigations

Investigation in the military departments, as in civilian ones, starts from the personnel forms and varies in intensity with the sensitivity of the position filled and the nature of the information developed. Non-sensitive appointments are, as in civil agencies, made subject to agency check and written inquiry. The Army excepts appointments under six months and aliens employed overseas. The Air Force regulations require only a check of employees references and local agencies for temporary or seasonal employees under three months. If derogatory information is developed in any of these cases, the investigation is extended.

The top sensitive appointments are made only after the completion of what the defense departments call a "background" investigation, which is approximately the equivalent of a full-field investigation.[25] An emergency appointment may be made but at least a satisfactory national agency check must first be completed. A national agency check is required before appointment to other sensitive jobs and the appointment is subject to the satisfactory completion of the background investigation. In emergency, the position may be filled by one on whom no check has been made. The Air Force regulations are substantially similar but a lot more intricate.

Incumbents of sensitive positions are subject to full field investigation but may continue to occupy their positions pending completion. The Air Force requires only a national agency check for the lowest sensitive group of incumbents. The Army allows past investigation to suffice for present clearance if it meets the present requirements. Of course, under the Executive Order, cases previously investigated are re-adjudicated by the present standard. The Defense departments operated

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[25] A neighborhood investigation is not generally made except to prove or disprove derogatory information developed in other ways.

A great emphasis is placed in background investigation on citizenship status and on foreign travel and connections.

both loyalty and security programs during the Truman administration so that this provision should have little practical effect.

The Directive is silent on procedure; it refers the departments to Public Law 733. As the regulations were developed, each department uses three levels of boards, a security screening board at a pre-charge stage, a hearing board, as required by the statute, and a review board, which affords the employee an appeal after hearing, a development peculiar to the military departments.

Disposition of Applicants

The civilian agencies, it will be remembered, have no formalized procedure by which an applicant can appeal. The situation under the armed forces regulations is more difficult to ascertain and the practice is not uniform.

The Army is silent on this point. There are detailed directions for handling the files after a determination has been made, but no hint of what happens before. The Navy provides that all cases in which an FBI full field investigative report is received are referred to the activity Screening Board. This would include all cases in which derogatory information dealing with subversion was developed. A Screening Board may request further investigation, an interview, etc. These powers are given to the Board in all cases; hence, they are available when the Board handles an application. The Board makes a recommendation to the head of the activity who makes the final decision. There is no appeal from this decision.

The Air Force states that the appropriate military Command on receiving the investigative report may decide that the applicant should not be appointed. If, notwithstanding the presence of derogatory information, he feels the appointment should be made, he may do so if it is to a non-sensitive position. If the position is sensitive, the case must be processed. Whatever the determination, all reports of derogatory information are forwarded to the Central Security Board, with a statement of the action taken. The Security Board reviews all cases, may issue interrogatories, have investigation made, etc. It may in its discretion grant a hearing to the applicant.

Evaluation of Reports—Army

Derogatory reports come to the installation or command of the Army. A decision is made whether to continue employment. Additional investigation may be made. Suspension occurs at this point only if security warrants it. The file is forwarded to major command headquarters, within three days if the employee has been suspended. The major command makes a determination and a recommendation and forwards to the command echelon or G-2, depending on the position of the command. The head of the service of the Army having command will review, make recommendations, and forward to G-2.[26]

G-2 will then review. It may make further investigation, issue interrogatories, return the case to the major command for an interview with the employee, or recommend suspension or revocation of clearance, if this has not already been accomplished. If the decision is to end employment, the case is sent to the Screening Board which is in the Office of the Secretary of the Army. A recommendation and rationale accompany the file and if the recommendation is adverse, a suggested list of charges is included. The Board reviews the case and makes a recommendation to the Secretary. It, too, may prepare interrogatories, direct an interview or further investigate. If the recommendation is favorable, G-2 may concur. If it dissents a detailed rationale for non-concurrence is required. If the recommendation is unfavorable and approved by the Secretary, the Board draws up the charges.

Evaluation—Air Force

The Air Force procedure is similar. Reports are transmitted to the Commander through the Director of Special Investigations, who also forwards a copy to the Central Security Board. He may recommend to the latter that the employee be suspended before sending the file to the installation.

The Commander makes his determination. If it is to retain, he so states with reasons. He may suspend. However, interim action, such as a change or a restriction of duty, is preferred.

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[26] At any time before a letter of charges is issued, the commander may end suspension. Only the Secretary of the Army may authorize payments for the suspension period.

Before suspending, "to avoid unwarranted or premature suspensions" and to "ensure the orderly processing of cases" the Commander must contact the Executive Secretary, Civilian Personnel Security Program, at Headquarters in Washington. If the employee is suspended, he receives a copy of the regulations and is told he will get charges or instructions from the Board. At the time he is suspended, the Executive Secretary must be notified, a description of the position occupied forwarded, and a statement made why interim action is not sufficient to safeguard security. Whatever action is taken, the file is forwarded, with the recommendation, to Special Investigations at Washington. It must contain information as to whether it is practicable to reassign the worker to another, non-sensitive position on a permanent basis.

The Director submits this file with his recommendations to the Central Security Board, with a summary of facts.[27] The Board reviews the case, making investigation or interrogation as needed. It may recommend favorable finding, further investigation, processing to removal or other administrative proceedings.

The Board may direct suspension or it may restore a suspended employee to duty. It is required to take into consideration not only the usual security needs but "the fact that an unwarranted or premature suspension may result in needless effort or embarrassment on the part of the employee or the Air Force." If it decides adversely to the worker, it will prepare charges and a notice informing him of his rights. Normally, suspension occurs at this time.

Evaluation—Navy

The Army and Air Force have central screening boards which act as a check over the Commander's decision. The Navy puts greater power in the hands of the Commander. A screening board is appointed by the head of each activity and handles only the cases of that activity.[28] In small activities the Commander may dispense with the board.

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[27] This Board has at least three members. One is from the Inspector General's office, one from Personnel, and one from Judge Advocate or the General Counsel's office.

[28] This is composed of three employees of the activity. Preferably, two should be civilians.

The board, if one exists, reviews all cases in which a full field report is received and all cases formerly adjudicated under 9835. It may direct further investigation. It may request advice on the reliability of confidential informants from the FBI. To clarify minor points prior to recommendation, the employee, if he so desires, may be given written interrogatories. These are not to be used to confront the individual with seriously derogatory information. The Board may interview any local personnel, including the employee. It makes a recommendation to the activity head but he makes the decision. However, if he disagrees with the board, he must include his rationale in the file.

Disposition Without Hearing

The Navy states that an appointee, defined as an employee who has not completed twelve months of government service, may be separated administratively. Administrative separation is not defined; it would presumably have to meet the requirements of Public Law 733, however. An "incumbent" who is an employee past probation period is furnished with charges.

The Army gives in a six-line paragraph the procedure applicable to the employee not entitled to a hearing. Cases of appointments of under a year are not ordinarily processed through security regulations. Their contracts are simply not renewed and no reference is made to security in the termination. The undefined status of the Navy appointee has been indicated.

The Air Force is as brief as the Army on these cases. However, it allows all employees and even applicants hearings at the discretion of the Central Security Board. The regulations suggest that a hearing should normally be granted.

Hearings; Boards

If a hearing is requested, a board is convened. The Army provides that the Executive Secretary of the hearing board will schedule a hearing even if no request is made and the employee will be notified of the time and place. The Navy provides that if no reply is made, the head of the activity will

consider the case, no presumption being made against the em ployee for failure to respond. This would seem a formal step the Commander has just decided to suspend and no new in formation has arisen. If there is a reply, but no hearing i requested, the head will consider the case. He may, in his dis cretion, schedule a hearing, again with no presumptions drawn if the employee fails to appear. The Air Force forwards the file, with or without answer, through the Review Board if no hearing is requested.

If an Army employee requests a hearing, the Executive Secretary of the hearing board will review the file. If his opinion is favorable, an advisory panel of the Board will be named. If it concurs, it may meet formally in executive ses sion and submit a recommendation to the Office of the Secre tary, Administrative Assistant. The employee will be given no notice of this hearing unless he should happen to inquire

By an agreement approved by the Department of Justice the military departments supply each other with hearing board personnel. In the Washington area, an official roster is kept by the Defense Department. In continental United States and the territories, the boards are also drawn from the other military departments. Overseas, and in isolated areas any where, boards are taken from the employees of the installation and may therefore be composed of members of the same de partment as the employee being heard. Board members are chosen from the highest ranking personnel available.

The boards are composed of military and civilian personnel A majority must be civilian. The Army and Navy provide for an Executive Secretary of the Hearing Board who is in charge of all administrative details of the hearing. The Executive Secretary is a civilian employee, appointed by the Commander The composition of the Board will vary from case to case but the Secretary is permanent. The regulations require that, if possible, he be someone who was connected with the old loyalty security program. He must meet the background investigation qualifications of the Board but not the grade requirements The Executive Secretary in the Army selects the Board for the

hearing. In the Navy, he does the same in the name of the activity head.[29]

Each member of the Board studies the file prior to the hearing. The Air Force warns them that this is only one side of the case and judgment must be reserved. The Naval Board may consult with Intelligence on the reliability of confidential informants and the method by which information is obtained. They must be informed of the nature of each organization which may figure in the case.

Conduct of Hearings

The departments provide for a Legal Advisor to aid the Board in examination and in procedure. The Air Force provides that if the employee appears without counsel the Legal Advisor is to inform him of his rights and aid him in points of procedure. This does not relieve the Board of its duty to advise. The Navy states also that if the government has an attorney handling the case, he may examine in aid of the Board. The Army has an optional JAG representative and a Security Advisor to the Board. The latter may question only through the Board.

In most essentials, the hearings do not vary from civilian agency hearings. The regulations are a good deal more detailed, however. Instruction is given in how to weigh evidence, what to consider, etc.[30] The boards are warned in general

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[29] The Executive Secretary maintains liaison with the Civil Service Commission and the other military establishments in the area to ensure that a panel is currently available. He takes care of travel orders for the members of the board, transmits invitations to witnesses, arranges the physical and temporal details of the hearing, gets clerical aid to the Board, makes sure files don't go astray, sends them along to the next stage, etc.

In the Air Force, the Board sets the time and place for hearing.

[30] The Navy instructs that documentary evidence is accepted as reliable unless the employee furnishes clear proof to the contrary. A denial raises a question of credibility.

In evaluating a witness' testimony, the Board is to consider how well he knew the employee, that their relation was, when he knew him, and any motive he might have for testifying.

The demeanor of the employee, his evasiveness or cooperation, the consistency of his current answers with past representations are factors. Misrepresentation is itself grounds for dismissal.

The Air Force cautions that derogatory information is to be weighed by recency, relative seriousness, the attendant circumstances, the relevancy to the charges, the supporting independent information, whether it was given under oath, and the opportunity the employee had to rebut.

to protect confidential sources and are specifically told not to ask questions which might reveal information. They are also warned away from irrelevant questioning and constitutional arguments.

It is standard practice in the military departments to send an invitation to all witnesses who have given adverse information and who have not indicated that their identity was to be kept confidential. A witness may testify at the hearing or in private before the Board. He is asked if his statement or his name may be given to the employee. If he does not appear, his testimony may still be used, but his non-appearance should be weighed. There is the usual provision about taking into account the employee's handicap by non-disclosure.

Decision, Review and Appeal

The Board then makes a finding, a decision in writing and a memorandum of reasons. The Air Force regulations require a finding to each allegation and an analysis of the information and the reason for the finding. The Air Force further provides that the Board may advise reassignment if there is a suitable vacancy and the Commander approves.

The file is forwarded to Washington for post-hearing review and appeal procedure. The Army and Air Force Boards review all cases; the Navy Board considers appeals and other cases on its own motion. The employee may file briefs or papers when the decision of either board is adverse. All review boards consider additional written evidence and briefs.

The review boards make a recommendation to the Secretary, who makes the decision. A favorable decision acts as a clearance for the employee to have access to classified information on a need-to-know basis. The provisions for lost pay, the prohibition against rehiring, the reports to the Civil Service Commission, the confidential nature of the files, are covered sketchily, but the provisions of the Executive Order apply.[31] The Navy Department will on inquiry about an employee sep-

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[31] If the employee resigns while charges are being processed, his records will bear this notation.

The Army provides that once the employee is suspended and charges have been made, separation under other procedures, such as reduction in force, is held in abeyance.

arated for security reasons state only that he was separated for unsuitability.

MILITARY PERSONNEL

Security programs for military personnel have been in operation for more than six years. In 1948, a joint memorandum of the departments forbade the enlistment or appointment into the armed forces, without the approval of the department, of one who "admits" or is otherwise believed to have engaged in disloyal or subversive activities. In 1949, another memorandum ordered that inductees who refused to execute loyalty oaths and others suspected of subversion were to be denied access to classified material and to be kept on duty under surveillance. A system of discharging security risks developed, with no statutory authorization other than the general disciplinary powers of the armed forces.

The public was informed of some of the mechanics of the system at the hearings of the Senate Committee on Armed Service to revise the Doctor Draft law, March and April of 1954. The Department of Defense then issued a public memorandum. Pursuant to this, the military departments released revised regulations in 1954.

Criteria

The criteria adopted by Defense for military personnel are substantially the same as the criteria applied to civilians,[32]

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[32] The Defense Department criteria are:

"a. Commission of any act of sabotage, espionage, treason or sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

b. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests are inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of Government of the United States by unconstitutional means.

c. Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of Government of the United States by unconstitutional means.

except that they omit "sympathetic interest" in subversive movements (short of membership). The suitability criteria are included; but it is directed that they be processed under non-security procedures if not combined with security cri-

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d. Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted or shows a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights, under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means. (An organization, movement, or group officially designated by The Attorney General of the United States to be totalitarian, Fascist, Communist, or subversive, to advocate or approve forcible or violent denial of Constitutional rights, or to seek alteration of the form of Government of the United States by unconstitutional means, shall be presumed to be of a character thus designated until the contrary be established.)

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interest of another government in preference to the interests of the United States.

f. Failure or refusal to sign loyalty certificate DD Form 98; pleading protection of the Fifth Amendment or of Article 31, Uniform Code of Military Justice, in refusing to completely answer questions contained in DD Forms 98, 390, or 398; pleading protection of the Fifth Amendment or of Article 31, Uniform Code of Military Justice, or otherwise failing or refusing to answer any pertinent question propounded in the course of an official investigation, interrogation, or examination, conducted for the purpose of ascertaining the existence or extent, or both, of conduct of the nature described in a through e above, and g through m below.

g. Participation in the activities of an organization as a front for an organization referred to in d above, when his personal views were sympathetic to the subversive purposes of such organization.

h. Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purposes.

i. Participation in the activities of an organization referred to in d above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

j. Sympathetic association with a member or members of an organization referred to in d above.

k. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in a through i above. A close continuing association may be considered to exist if the individual lives at the same address as, frequently visits, or frequently communicates with such person.

teria.[33] The Defense Department regards violation of security regulations as a matter of discipline rather than of security and includes it in this second category. The constituent departments made no departures from these criteria.

Volunteers

The Defense directive states that no one reasonably believed to have engaged in any of the listed activities at any time may be appointed or enlisted in the armed forces without the approval of the secretary of the department. A volunteer fills out the standard loyalty certificate (DD 98) to which is attached a list of the organizations on the Attorney General's compilation. In addition to general questioning about subversive activities, the certificate requires one to indicate the extent of his participation in any named organization, including not only membership but attending meetings or social gatherings which the organization sponsored. If the form is not completed, the application is denied. If from the form or otherwise, there is reason to believe the applicant is ineligible

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l. Close continuing association of the type described in k above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

m. Any facts, other than as set forth in 2 below, which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of national security. Among matters which should be considered in this category would be the presence of a spouse, parent, brother, sister, or offspring in a nation, a satellite thereof, or an occupied area thereof, whose interests are inimical to the interests of the United States

Category (2), which is normally processed under other regulations.

a. Willful violation or disregard of security regulations.

b. Intentional unauthorized disclosure to any person of classified information, or of other information disclosure of which is prohibited by law.

c. Any deliberate misrepresentation, falsification, or omission of material fact.

d. Any criminal, infamous, dishonest, immoral or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

e. All other behavior, activities, or associations which tend to show that the member is not reliable or trustworthy."

[33] The Defense directive states that the security regulations are an administrative procedure which does not preclude trial by court-martial when appropriate or separation on non-security grounds.

The Air Force requires the Commander, when recommending suspension, to state that other action was considered and found inappropriate.

under the criteria, the case will be forwarded to a designated personnel or security officer for processing. There is no appeal. The volunteer serviceman has a position like that of the applicant for civilian employment.

Reserve officers going on active duty must also complete the form. If the entries made give rise to a security question, and he is a volunteer, the army will treat him like other volunteers; if he is involuntarily recalled, his case will be processed through the channels to be described below. The Air Force processes both types of reservists through regular procedures.

The Navy will make an interim assignment and an investigation. It may put the suspect reservist in active duty, court-martial him when appropriate, or release him. If the disclosure or refusal was made with intent to avoid duty, the Navy may retain him on restricted activities and subject him to discipline for this act under the Uniform Code of Military Justice.[34]

Conscripts

The conscript and the drafted doctor raise major new problems. Civilian personnel and volunteers, it will be recalled, are retained only if retention is "clearly consistent" with national security. There is, however, some danger of draft-dodging. The military fear that a person subject to call may refuse to execute the certificate or fabricate derogatory information to avoid service. Hence the milder standard applied to the inductee, which reverses the emphasis of the civilian standard: the conscript will be retained unless there is sufficient derogatory information to require discharge. The other novel element in this situation is that the conscript's involvement with a security program is involuntary.

Inductees are now required to complete the loyalty certificate before entering the service. A known Communist or subversive will not be inducted. If the inductee refuses to execute the certificate or reveals significant derogatory information, he is accepted and, pending investigation, is retained in the lowest enlisted pay grade in a non-sensitive position. There

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[34] A national agency check is now made of all officer candidates and reservists considered for recall.

can, however, be no permanent assignment to such restricted duties without adjudication under these regulations.

If the inductee refused to execute the certificate and if investigation and processing reveal that retention is inconsistent with national security, he will be discharged with an undesirable discharge. If there is derogatory information insufficient to require discharge, he will be retained in service under controlled conditions and the ultimate discharge will be based on the service he has rendered.

If investigation shows that retention is inadvisable but no information is developed which the individual did not reveal on his questionnaire, he will be given a discharge commensurate with the services rendered. If there is less serious derogatory information, he will be retained in whatever assignment is appropriate, and the discharge will be based on behavior in service.

A slight variation is involved in the special draft of doctors and dentists. Those who fail or refuse to meet the security standards are denied a commission. They are referred to selective service for induction as enlisted personnel. An investigation and a determination will be made within ninety days if possible and in every case within six months. If the individual is held a security risk, he will be released with a discharge so stating, unless the fact causing this determination is beyond his control. If no risk is involved, he will be offered his commission if otherwise qualified. If there is doubt, he will be retained in enlisted status and used in his professional capacity under security restrictions.

Types of Discharge; Retention in Controlled Duties

It has hitherto been the policy of the armed forces that discharge should reflect only the quality of behavior in the service. There are five classes of discharge, for other than physical or mental reasons: honorable, general,[35] undesirable, bad conduct, and dishonorable. The honorable, the general

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[35] The general discharge is given for the same reasons as an honorable discharge. The conduct is satisfactory but not sufficient for an honorable discharge.

The general discharge may also be granted when separation is for inaptitude and unsuitability.

and the undesirable are administrative discharges; only a court-martial can give a bad conduct or dishonorable discharge. A regular officer, with over three years' service, can be given a discharge under other than honorable conditions only by sentence of a court-martial. Doubt as to retention is to be resolved against the serviceman; doubt as to the type of discharge is to be resolved in his favor.

All officers and warrant officers are deemed to hold sensitive positions by virtue of their commission, regardless of their assignment. Non-commissioned officers are generally considered sensitive. Any position which requires access to classified information is of course sensitive. Hence, the serviceman who is retained in controlled conditions because there is derogatory information insufficient to warrant discharge is likely to be held to the lowest level of military life.

Investigation and Evaluation

Investigations for the Army are conducted by Army staff and instituted at the major command level for military personnel. When a report is made on information raising security implications, the commander makes a recommendation to the major command and takes any action necessary to protect security in the meanwhile. At this point, the commander will also institute what is known as "flagging" procedure. All official personnel files are marked to show that action is being taken by intelligence personnel which would preclude favorable action or change without the prior approval of the Department.[36]

When investigation is completed, a recommendation will be made to the major command. The case may be closed favorably by the major command. If an unfavorable determination is made, the recommendation is forwarded to the Security Division of G-2.

G-2 may direct an interview or further investigation; interrogatories to the serviceman are frequently issued by G-2. The case may be closed favorably or recommendation may be made for removal or restriction procedures. The case is then sent to a screening board of field officers. This board, too, can

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[36] The Air Force has a similar practice.

recommend further investigation, court martial, elimination, discharge under other regulations, or retention in controlled duties. A favorable recommendation is sent to the Review Board. If a recommendation to discharge or hold in controlled duties is made, a Letter of Allegations is prepared and delivered. The parallel to the stages of civilian personnel procedure is clear—the command, the major command, the board at the department level.[37]

In the Air Force, derogatory information coming to the Commander is sent on for investigation, interim action being taken if needed. On receipt of the investigative report, the Commander makes a determination. He may close the case, if the decision is favorable, or he may recommend removal.

All cases, including those of inductees and applicants, are reviewed by the Director of Special Investigations and then by the Military Personnel Security Committee.[38] The Committee may interrogate or request further investigation. It then makes its recommendation. If favorable, the case is closed. If not, a notice and a statement of reasons is delivered. Here, too, the channels parallel the civilian personnel process.

The Navy channels are more difficult to follow. Initial processing of all cases, including applicants, may be by the Chief of Naval Personnel or a Bureau or Headquarters Security Board. The Board is composed of three or more officers who "variously function as initial, intermediate, or final administrative processing bodies, and as intermediate and final review boards." It makes a recommendation to the Chief of Personnel who in turn makes the decision.

If the determination is adverse, the Chief will obtain from Intelligence a narrative statement of fact as disclosed by the investigation; written interrogatories are drafted to allow the individual to explain or refute the charges of the narrative.

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[37] The Defense directive and the regulations warn that action to warn suspects must be avoided. Before processing under these regulations Intelligence must be consulted. If processing would endanger another current investigation, the serviceman will be retained for the time.

[38] This is composed of three officers, a colonel and two lieutenant-colonels. One is from Judge Advocate, one from Provost Marshal, and the third from Personnel.

Charges and Hearing

When charges are delivered, the serviceman has the option to retire (if he is eligible) or to apply for a discharge; but he must agree to accept an undesirable discharge. The final nature of the discharge is in the discretion of the service; it may be under honorable conditions; it may not. The Navy allows a statement to be submitted showing why a higher discharge should be granted.

Alternatively, the serviceman may answer the charges in writing and request a hearing before a board. The period for answering is short, not more than fifteen days. The Navy is strict in granting extensions, the Air Force, liberal.[39]

Army and Air Force field boards are composed of field grade officers, all senior in temporary and permanent rank to the serviceman. The Navy requires only that they all be officers. If the defendant is in the reserves, the Army requires one, and the Air Force and Navy a majority, of the Board, to be reserve. If the defendant is a woman, a woman officer sits, but (in the Air Force) only in an advisory, non-voting capacity.

The serviceman is furnished military counsel if he desires. He may have civilian counsel, at his own expense. The Board will aid in procuring witnesses, if he needs assistance. The atmosphere is nonetheless more adversary than at a civilian hearing. The order of presentation is more rigid and like a trial; the Navy specifically grants opening, rebuttal and closing to the recorder who presents the department's case. In most other respects, the civilian and military hearings are the same.

Decision and Review

The Board then makes a finding, in detail, with an opinion. It recommends what action is to be taken, advising as to retention or discharge and the type of discharge. The Army, with the problem of the inductees, adds the alternative of retention in controlled condition. The Air Force allows the lowest grades

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[39] The Navy will grant extension only for serious illness or for unique evidence and other extraordinary circumstances.

of airmen to be retained and assigned to non-sensitive positions.[40]

The convening authority in the Navy may review the record and return the case to the board for revision or clarification. He may not direct new findings. He then transmits the file to the Chief of Personnel who sends it for further review to a Bureau or Headquarters Security Board. Final decision is usually made by the Chief. However, he may forward it to the Secretary of the Navy to determine, with or without a further review by a Department of the Navy Security Board. This Board is to be consulted only when there is dispute among members of other boards and/or other authorities.

The Army and Air Force inform the serviceman that he may further appeal his case by brief, arguments and additional evidence. The Review Boards may request further information and may call the defendant to appear. The Army Review Board then directs action. The Air Force has a legal review by the Judge Advocate General and a decision by the Secretary. If the decision is favorable to the serviceman, he is cleared for the position and for the access to classified material it requires. Clearance is for the job involved and not merely for retention in service.

If the decision is to discharge the serviceman, the discharge is based on the gravity of the reasonably substantiated derogatory information, whatever the character of the services rendered. If the serviceman is a conscript who revealed fully derogatory information on the loyalty certificate he will receive a discharge based on the service rendered. Doubt as to the nature of the discharge is to be resolved in favor of discharge under honorable conditions.

In each department, there is a Board of Review of Discharge and Dismissals and a Board of Correction of Military Records. Neither operates under the Uniform Code of Military Justice nor under the security regulations. They are, however, available for security cases. The boards of discharge review are composed of civilian officials chosen by the

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[40] Indefinite assignment to these controlled positions needs the approval of the Secretary. It cannot be extended beyond the current term of enlistment. The serviceman may not re-enlist without department permission.

Secretary of the constituent departments. They meet at Washington, unless otherwise designated. They do not review courts martial. They handle administrative discharges, on appeal or on their own motion. An appellant may appear in person or by counsel. The boards cannot revoke a discharge, but they can amend its nature.

When any proceedings—dismissal or rejection—are taken under these regulations, the Civil Service Commission and the Federal Bureau of Investigation are notified. Thus, future employment in government or defense is unlikely. There are the usual provisions for secrecy of files.[41] The Defense Department gives no access even to other departments with security programs without the prior approval of the appropriate secretary.

The separated serviceman is not allowed to re-enlist without the approval of the Secretary of the department. If his discharge is an undesirable one, he will be limited in the benefits which, as an ex-serviceman, he would otherwise receive.

DEFENSE CONTRACTORS PERSONNEL CLEARANCE

The military departments operate a third security program, this one affecting nearly three million private employees. All industrial facilities utilizing classified information must be cleared through the contracting department.

Since 1950, about 20,000 plants and 500,000 employees have been cleared for Top Secret, Secret and some Confidential information. In addition, about two million employees have been granted access to Confidential material. The size of the program may be judged by the estimated 200 facilities and 4,000 employees cleared monthly. Six hundred and eighty-eight persons have been denied clearance in a four-year period up to July 15, 1954.[41a]

Each plant seeking a government contract utilizing classified

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[41] The military departments classify as confidential all personnel security records and documents of a disciplinary nature, disclosure of which could be prejudicial to discipline and morale.

Information will be released only on a determination that the request is based on a legitimate interest and the release will not prejudice the public good.

[41a] Statement of Secretary of Defense Wilson before the Senate Armed Services Committee, July 15, 1954.

matter must have its physical set-up and its important personnel approved. A foreign owned, controlled or "influenced" company is not eligible for clearance. An inspection is made of the premises. Investigation is made of officers, directors and the key employees who will have access to classified matter for preparing bids. A facility denied clearance on physical elements has no appeal. A denial because of personnel may be appealed to the Appeals Division of the Board. A security agreement is made part of the contract.

Investigation

Personnel are cleared according to the category of information they will need to receive. Since investigation is ordinarily not begun prior to employment by the facility, an interim clearance is granted. Clearance is made by the military department having security cognizance of the facility, or by the management for the lowest level of security information (Confidential).

For Top Secret, a background investigation is required. For Secret information, an American citizen needs a national agency check; an alien must have a background check.

Officers, directors and key employees requiring access to Confidential information are given an agency check. Aliens must have a background investigation.

All other citizens with access only to Confidential material at the facility are cleared by management in the absence of derogatory information. Many facilities have therefore had to establish investigative staffs of their own or utilize detectives and credit agencies. A review is made of personnel records. Checks are usually made at credit bureaus and police files, verification made of past employment and the like. FBI information is not available directly but it may come through the military department.

Denial of security clearance need not mean dismissal from the company. The military department by its contracts requires only that the employee be kept from classified material and from areas where classified production is carried on. But dismissal may often follow for a variety of reasons.

Evaluation

If the military department thinks clearance should be denied or revoked, the case is forwarded to a Screening Division of the Industrial Personnel Security Board. There are three Boards in the United States. The Eastern is under the administration of the Army, the Central of the Air Force, and the Western of the Navy. The appropriate commander appoints an Executive Secretary, a Security Advisor and a Legal Advisor to aid the boards. The boards are authorized to convene at any military establishment in the area. Each Board has a Screening and an Appeal Division.

A company may not revoke a clearance once granted, though it is free to transfer or dismiss the employee on its own initiative, subject to its obligations under collective bargaining or other contracts. Any derogatory information must be submitted to the security office of the military department in charge of the facility. The military department may revoke clearances in exceptional cases but it must forward the case immediately to the Screening Division with an explanation of the action.

The Screening Division (three members) reviews the case. If the determination is unanimously favorable, clearance is granted. If not, in collaboration with a Security Advisor and a Legal Advisor, a notice of denial or revocation and the reasons for the action are prepared. This, and a copy of the regulations, are sent to the contractor or employee, as the case may be. He may answer, within ten days, in writing and under oath.

The file is then considered, with any answer given. Again unanimity is required to clear. If it is not attained, the clearance is denied or revoked. The employee (or the contractor, if the clearance for the whole facility is in question) may then appeal to the Appeals Division, in writing or at an administrative hearing.

Hearings

The Appeals Division (also three-man) must include at least one attorney and one civilian and the Chairman must be a civilian. Hearings are conducted like the hearings the military

departments conduct for civilian employees. Decision is by majority vote and includes a finding as to each allegation. Decision is subject to no review, but the Appeals Division may reconsider the case on its own motion, or on appeal from either side.

The criteria are the same as those in the defense directive for civilian personnel. With respect to paragraph (1) (suitability criteria) the qualifying phrase "the relation of the employment to the national security" is missing. Since all these cases deal with classified matter, all the positions involved are "sensitive" by definition. Hence, the change is probably without significance.

Though the directive does not provide for review, apparently the military department concerned can effectively intervene. The Navy recently suspended the clearance of Dr. E. U. Condon and returned the case to the Industrial Review Board for "reconsideration" (N.Y. Times, Oct. 22, 1954).

III. ATOMIC ENERGY COMMISSION

The military department clearance of defense facilities and personnel rests largely on its contracting power. The Atomic Energy Commission program rests on specific statutory authority as well as contractual control. It uses exactly the same procedure for its own personnel and that of its contractors. Since the inception of the atomic energy development program, the Commission's work has been done largely through contracts with private companies.

The Act authorizes the Commission to make arrangements for research, to contract for special nuclear materials to be produced with government facilities, and to license commercial and medical research and development of atomic energy. The person with whom such arrangements are made must agree to permit no one access to "restricted data" without investigation of his "character, associations, and loyalty". "Restricted data" is the equivalent of "classified information". All AEC employees must have similar clearance. The President may direct that investigation be made by the FBI of some or all groups of employees or contractors, and the Commission may certify specific positions of particular sensitivity to be handled

by the FBI. If a Civil Service Commission investigation develops data reflecting on loyalty, the CSC refers the file to the FBI for full field investigation.

The AEC received the authority, in 1954 amendments to the Act, to establish the standards for the investigation and to specify the scope and extent of investigation to be made. It will be based on the location of the work and its nature, and the importance which the restricted data to which access is granted has for the national security. Previously, a full background investigation had to be made for everyone with access to any level of restricted data.

The standard in the present regulations, dating from 1948, is phrased in terms of danger to the common defense or security. The precaution is included that weight must be given to favorable information. A balance is to be made of the possible risk the person represents and the cost to the program of not having his services.

Criteria

The criteria are in two categories. Information in Category (A) creates a presumption of security risk. Category (B) is composed of derogatory information "where the extent of activities, the attitude, or conviction of the individual" must be weighed in determining whether a presumption of security risk exists.

The Criteria include:

"(A) Reasonable grounds to believe that the individual or his spouse has

"1. Committed or attempted to commit or aided or abetted another who committed or attempted to commit any act of sabotage, espionage, treason, or sedition.

"2. Established an association with espionage agents of a foreign nation; with individuals reliably reported as suspected of espionage; with representatives of foreign nations whose interests may be inimical to the interests of the United States. (Ordinarily this would not include chance or casual meetings; nor contacts limited to normal business or official relations.)

"3. Held membership in or joined any organization

be totalitarian, Fascist, Communist, subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means, provided the individual did not withdraw from such membership when the organization was so identified, or otherwise establish his rejection of its subversive aims; or, prior to the declaration by the Attorney General, participated in the activities of such an organization in a capacity where he should reasonably have had knowledge as to the subversive aims or purposes of the organization.

"4. Publicly or privately advocated revolution by force or violence to alter the constitutional form of Government of the United States."

(A) Also includes cases where the individual has

"5. Deliberately omitted significant information from or falsified a Personnel Security Questionnaire or Personal History Statement. In many cases, it may be fair to conclude that such omission or falsification was deliberate if the information omitted or misrepresented is unfavorable to the individual.

"6. Violated or disregarded security regulations to a degree which would endanger the common defense or security.

"7. Been adjudged insane, been legally committed to an insane asylum, or treated for serious mental or neurological disorder, without evidence of cure.

"8. Been convicted of felonies indicating habitual criminal tendencies.

"9. Been, or who is, addicted to the use of alcohol or drugs habitually and to excess, without adequate evidence of rehabilitation."

Category (B) includes those cases where the individual or the spouse has

"1. Sympathetic interest in totalitarian, fascist, communist or other subversive political ideologies.

"2. A sympathetic association established with members of the Communist Party; or with leading members of any organization set forth in Category A, [illegible]

clude chance or casual meetings, nor contacts limited to normal business or with official relations.)

"3. Identification with an organization established as a front for otherwise subversive groups or interests when the personal views of the individual are sympathetic to or coincide with subversive 'lines'.

"4. Identification with an organization known to be infiltrated with members of subversive groups when there is also information as to other activities of the individual which establishes the probability that he may be a part of or sympathetic to the infiltrating element, or when he has personal views which are sympathetic to or coincide with subversive 'lines'.

"5. Residence of the individual's spouse, parent(s), brother(s), sister(s) or offspring in a nation whose interests may be inimical to the interests of the United States, or in satellites or occupied areas thereof, when the personal views or activities of the individual subject to investigation are sympathetic to or coincide with subversive 'lines' (to be evaluated in the light of the risk that pressure applied through such close relatives could force the individual to reveal sensitive information or perform an act of sabotage).

"6. Close continuing association with individuals (friends, relatives or other associates) who have subversive interests and associations as defined in any of the foregoing types of derogatory information.

"7. Association where the individuals have enjoyed a very close, continuing association such as is described above for some period of time, and then have been separated by distance; provided the circumstances indicate that a renewal of contact is probable."

(B) Also includes those cases where the individual has

"8. Conscientious objection to service in the Armed Forces during time of war when such objections cannot be clearly shown to be due to religious convictions.

"9. Manifest tendencies demonstrating unreliability or inability to keep important matters confidential; willful or gross carelessness in revealing or disclosing to any unauthorized person restricted data or other classified matter pertaining either to applicants

of the Atomic Energy Commission or of any other Governmental agency; abuse of trust, dishonesty; or homosexuality."

The trier is not limited to the criteria and may examine anything he thinks relevant.

It should be noted that for most of the criteria which have loyalty connotations, either the individual or his spouse's acts may be considered. The criteria most closely resemble those of the Defense Department for civilian employees; but they may be characterized as more moderate and as evincing a greater tolerance for deviation or experimentation in the past. The presence of a relative abroad is of significance only when the individual's views are along subversive lines, and an evaluation is to be made of the chance that pressure could be successful. Personal habits which might disqualify are more carefully defined and limited.

The most important difference is to be found in the AEC restriction of (3) to the Attorney General's list. The individual must have been and continued to be a member after the organization was identified unless his participation before identification was made was such that he should have known of the subversive nature of the group. "Sympathetic association" is restricted to leading members of these organizations.

However, "front" and "infiltrated" organizations are not limited to the Attorney General's list. "Identification" would seem to require, however, a deeper involvement than "participation in the activities".

Procedures

The Act provides that the Commission shall make adequate provision for review of dismissals. Since 1948, incumbents have been granted hearings and appeals and in 1950 these were extended to applicants. The policy of the AEC is to give maximum opportunity for administrative review that is consistent with national security.

The AEC has emphasized screening and informal procedures to reduce the number of cases. This may result in applicants' being denied employment by the government or the contractor on suitability grounds, without the protection of a hearing but

On receipt of derogatory information, if no grave security question is raised, the local AEC officer may have an interview for clarification. Clearance is not denied on the basis of the interview.

The Manager of the Operations Office concerned will present to the individual the notification letter with the adverse information. He must answer within ten days. A hearing will be scheduled before a Personnel Security Board. Failure to answer is a waiver of the board and all review proceedings.

The Board is chosen from local AEC and contractor employees, all having clearance. At least one must have some knowledge of the field of work of the individual. There is a right to challenge for cause, but the challenge is decided by the Manager who appoints the board.

Witnesses may testify under oath or not. The failure of the employee to testify may be considered by the board. The allegations may be amended and an adjournment to answer will be given. Added investigation may be requested. The hearing, in other essentials, is like the hearings previously described.

The recommendations, with the findings and a statement of reasons, is submitted to the Manager. He reviews the file and the effect which denial of clearance would have on the atomic energy program.

If the recommendation is adverse, the employee is notified and given the Manager's findings. He is told of his right to appeal to the Personnel Security Review Board and to submit briefs. The Manager might make a favorable recommendation and the General Manager, for the Commission, might not agree. Again, the individual is allowed to submit briefs to the Review Board. The board reviews and makes recommendations to the General Manager. The General Manager makes the final determination for the Commission, which itself considers important cases.

IV. THE PORT SECURITY PROGRAM

The Coast Guard program for clearing maritime and dock workers is probably the least known of all Federal govern-

million people. When fighting began in Korea, there was no legal authority for any maritime personnel security measures. The Coast Guard developed a voluntary plan with shipowners and some unions to prevent access to American ships and docks of anyone deemed a security risk. An appeal right was contemplated but the program was never completed. An interim procedure gave an appeal to a Coast Guard officer from which appeal could be taken to a five-officer board in Washington. This continued until the end of 1950 when the current program went into effect.

The Magnuson Act, passed in 1950, provides that "whenever the President finds that the security of the United States is endangered by reason of actual or threatened war . . . or of subversive activities," he may institute measures to "safeguard against destruction, loss or injury from sabotage or other subversive acts, accidents . . ." the ships and ports of the nation. The regulations were promulgated under this Act and an Executive Order which authorized the Commandant to prescribe identification papers for clearance.

Service on all vessels is restricted unless exempted by the Commandant. Seamen are already required to have a Federal license; security validation is stamped on that. The seaman applies at a Coast Guard Marine Inspection Office for clearance by the Commandant. A check is made against the files of the FBI and the Office of Naval Intelligence; there is no independent investigation. Clearance is denied if "the applicant's character and habits are such as to authorize the belief that the presence of the person aboard vessels of the United States would be inimical to the security of the United States."

Criteria

The criteria for determining if seamen are security risks are that the individual, on all the evidence available,

> "1. Has committed acts of treason or sedition, or has engaged in acts of espionage or sabotage; has actively advocated or aided the commission of such acts by others; or has knowingly associated with

"2. Is employed by, or subject to the influence of, a foreign government under circumstances which may jeopardize the security interests of the United States.

"3. Has actively advocated or supported the overthrow of the Government of the United States by the use of force or violence.

"4. Has intentionally disclosed military information classified confidential or higher without authority and with reasonable knowledge or belief that it may be transmitted to a foreign government or has intentionally disclosed such information to persons not authorized to receive it.

"5. Is or recently has been a member of, or affiliated, or sympathetically associated with, any foreign, or domestic organization, association, movement, group, or combination of persons (i) which is, or which has been designated by the Attorney General as being, totalitarian, fascist, communist or subversive, (ii) which has adopted, or which has been designated by the Attorney General as having adopted, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or (iii) which seeks, or which has been designated by the Attorney General as seeking, to alter the form of the Government of the United States by unconstitutional means: Provided That access may be granted, notwithstanding such membership, affiliation or association, if it is demonstrated, by more than a mere denial, that the security interests of the United States will not thereby be jeopardized."

The criteria are essentially the same as those of Executive Order 9835, the former Employees' Loyalty Program. Questions arising under suitability criteria are dealt with through the licensing procedure.

Access to designated waterfront facilities is also subject to clearance. The Commandant designates which facilities are restricted. They are those where shipping and other activity vital to military defense or military assistance are being carried on, and where explosives or other dangerous cargo is loaded. All major port areas have been so designated.

The Coast Guard issues a Port Security Card but other clearance is accepted.[42] An applicant must be sponsored by an authorized official of the company or the union. There is no provision for interim clearance.

A new criterion is added for dock workers,

"f. That such person is otherwise not a suitable and safe person to have access to such waterfront facilities and port and harbor areas, including vessels therein, by reason of:

"1. Having been adjudged insane, having been legally committed to an insane asylum, or treated for serious mental or neurological disorder, without evidence of cure.

"2. Having been convicted of any of the following felonies, indicative of a criminal tendency potentially dangerous to the security of such waterfront facilities and port and harbor areas, including vessels therein; arson, unlawful trafficking in drugs, espionage, sabotage, or treason.

"3. Drunkenness on the job or addiction to the use of narcotic drugs, without adequate evidence of rehabilitation."

Procedures

If clearance is denied or revoked, the person is notified in writing. He is told that he may appeal and what rights he would have at the hearing. His appeal is to an Appeal Board which is convened by the Commandant in one of the Coast Guard Districts. The chairman represents the Coast Guard.

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[42] The Coast Guard Port Security Card is not required if the individual holds:

1. Merchant Mariner's Document showing security clearance.
2. Armed Forces Identification Card.
3. Identification credentials issued by Federal law enforcement and intelligence agencies to their officers and employees.
4. Identification credentials issued to public safety officials when acting within the scope of their employment.

The two other members represent management and labor. These are nominated to panels by the Secretary of Labor and the Chairman makes his selection from the panel. The labor member will if possible be of the same union as the worker. If there is no one available with this qualification, one of the public alternates will be chosen. They are usually attorneys in the community. If practicable, at least one member of the Board should be an attorney.

A bill of particulars is prepared by the Commandant and furnished to the Chairman of the Board for transmission to the appellant. He may answer within ten days and within fifteen days after the notice is received, the Appeal Board will meet. Continuances are freely granted. The employee is informed in advance who the members of the Board will be and what their business or union affiliations are. He may challenge for cause, with affidavit and an oral presentation. In addition, he has two peremptory challenges, one directed to the management representative and one for labor. The appellant may decide if the replacement for the challenged member will be from management or labor, as appropriate, or from the public members of the panel.

The Coast Guard presents no evidence as a rule. The appellant may decide if hearings will be open or closed. The regulations governing the hearing generally are like all regulations on hearings.

The Board may request further investigation. On the hearing and the file, the Board makes a recommendation, with its rationale. The Commandant may approve or reject the decision or remand the case. An adverse decision may be taken to a National Appeal Board which sits in Washington. It, too, is a three-man board, composed of Coast Guard, management and labor. There is the same right to challenge. The hearing provisions are the same. The appellant may appear, have counsel, etc. The Commandant still makes the final determination. Even if the clearance is eventually granted, there is no provision for compensation for what may be an extended period of unemployment.

V. CIVIL SERVICE SEPARATION PROCEDURES IN NON-SECURITY CASES

Competitive and classified civil service are terms used interchangeably by Civil Service regulations. The competitive status is defined as one which permits promotion,[43] transfer,[44] reassignment,[45] and reinstatement without competitive examination. Status is acquired by probational appointment after competitive examination, by statute, or by other civil service rules.

The applicant for civil service appointment takes either an "assembled" or an "unassembled" examination. The assembled examination is an examination in the conventional sense—tests of skill, of intelligence, etc. The unassembled examination is not an examination at all. The applicant, in his personal history sheet, lists his educational and experience qualifications. He is given an interview. These are evaluated quantitatively and qualitatively and a rating is assigned.

The successful applicant is appointed to a position. The appointment may be temporary, for an indefinite period, or permanent. A temporary appointment is for a stated period, under one year. A temporary emergency appointment is for a period less than a month and is made without examination.

Permanent appointment was common prior to World War II. During the war, most appointments were made for the war period and no permanent competitive status was gained. A similar provision was put into effect with the Korean War.[46] Appointment is generally made for an "indefinite" period. Indefinite appointees are not eligible for retirement benefits, on

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[43] Promotion—"the advancement of an employee while continuously employed to a higher classification act grade or to a higher grade within the same agency—established pay schedule in which grades are assigned or from a lower rate paid under authority other than the classification act or vice versa or to a higher rate under a different agency-established pay schedule or under a pay schedule in which no grades are assigned." 5 CFR 64.301.(10).

[44] Transfer—a change of position during continuous Federal service without a break of one work day from one agency to another.

[45] Reassignment—a change without promotion or demotion from one position to any other position, while serving continuously within the same agency.

[46] Executive Order 10180, November 13, 1950. All future appointments were to be made non-permanent, with a few exceptions allowed the agency to maintain its permanent strength.

the whole. In reduction in force, the indefinite appointee is separated from service before the permanent. Almost one-third of all employees have indefinite appointments.

The permanent and the indefinite appointee serve a probation period of one year. The probationer has few rights procedurally until the year is completed.

The President may add to, or remove positions from, the classified service. If a position is removed, the incumbent is no longer entitled to the protection of the civil service procedure and may be separated at the will of the appointing authority.

Positions in the executive department excepted from the Civil Service are listed in three "schedules", A, B and C. Schedule A and B contain positions for which it is not practicable to hold competitive examinations. For jobs in Schedule A, no test is required. For Schedule B, a non-competitive examination must be passed. Executive Order 10440, March 31, 1953, authorized a new schedule, C, for positions of a confidential or policy-making nature. The Civil Service Commission has been issuing a series of directives stating which positions in each agency are included in this category. Many of the positions listed were previously in Schedule A. About 8 percent of federal employment is in "excepted" categories.

An applicant may be denied examination or a candidate denied appointment for cause. The Commission includes as cause:

1. Dismissal for delinquency or misconduct.
2. Physical or mental unfitness for the position.
3. Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct.
4. Intentional false statements or deception or fraud in examination or appointment.
5. Refusal to furnish testimony to the Commission.
6. Habitual excess drinking.
7. Reasonable doubt as to loyalty.
8. Any legal or other disqualification which makes him unfit.

These are also cause for separation if they develop or are discovered after the employee enters on duty. A person disqualified for an examination may be denied another test for

a period up to three years. All appointments are made subject to investigation of character and fitness and the employee may be removed within eighteen months of appointment if the findings are adverse.

Removal for Cause

It is a popular belief that a person appointed to a civil service position is almost impossible to remove. During a fifteen-month period ending March, 1948, 21,304 Federal employees were separated from employment for cause. Over half, however, were "blue collar" workers, who were only about 27 percent of personnel. Discharge was based largely on definite offenses —drunkenness, absence, past convictions, etc.—and rarely on general incompetency.

Contrary to the popular belief, there are few statutory restrictions on removal. The Lloyd-LaFollette Act, the basic law in this field, stated that removal of a civil service employee should be made "for such cause as will promote the efficiency of such service." Employees with status must be advised of the reasons for the action and given an opportunity to answer. The permanent or indefinite employee, past his probationary or trial period, and the employee having a competitive status but serving in an excepted position neither confidential nor policy-determining, has the protection of these civil service removal minima. The employee separated by order of the Commission because his appointment was contrary to regulation is not entitled to this procedure.

The Act does not define cause for separation. The Civil Service regulations allow removal for the same reasons which disqualify an applicant from examination or appointment. Religion, marital status, race, national origin or political belief, other than acts forbidden by law, are not cause for discharge. Removal based on any of these may be appealed to the Commission.

A temporary employee may be separated on notice in writing from the appointing authority. The probationary worker receives a notice in writing, giving the reasons for the discharge and the effective date of separation. He has no opportunity to answer except in the discretion of the agency.

The permanent or indefinite appointee, past probation, receives a notice in writing of the adverse action proposed. With the notice, he gets a list of charges, specific and detailed; but the supporting evidence need not be included. The employee need not be told who preferred the charges against him. However, the charges must be sufficiently factually detailed to allow answer, and no discharge can be based on charges not given the employee.

The worker is retained in an active duty status during this period of administrative proceedings. If necessary to protect government property, other employees or the public, he may be temporarily assigned to other duties or placed on leave without pay with his consent. In emergency, the department may suspend, issue charges, and require the employee to answer in a shorter period than is usually granted.

The employee must be given a reasonable time to answer the charges. The agency must consider the answer and at the earliest practicable date give the worker a written decision. If the determination is adverse, he is notified of the reasons for it and of the effective date of the adverse action. He is not entitled to a trial or a hearing or to any examination of witnesses, but these may be granted by the agency in its discretion.

The Act gives no review to the employee of the agency decision. The Civil Service Commission will not investigate unless it is shown that the required procedure was not followed or that removal was made for a prohibited cause. The employee must request review within ten days of the effective date of the action or the last decision of the employing agency review system.[47] His request must be detailed and under oath. The supporting evidence for his claim must be set forth in his request. A prima facie case for review must be made. The Commission may recommend reinstatement but it has no power to order it. The reinstated employee is compensated for any earnings lost in the period of wrongful discharge. He is deemed in service for this time except for accumulation of leave.

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[47] Extension is granted only on a show of circumstances beyond the control of the employee.

Veterans' Preference

The veteran and certain relatives of deceased or disabled veterans are entitled to preferred treatment, not only in appointment to civil service position but in separation proceedings. Almost half of all federal employees are in this status. The "Preference Eligible" serving under permanent or indefinite appointment, past the probationary period, may not be removed,[48] suspended, for more than thirty days,[49] furloughed without pay, reduced in rank or compensation,[50] or debarred from future appointment except for cause. The temporary or probational worker is not covered by these provisions; nor is the legislative or judicial employee; nor are most appointees confirmed by the Senate. The preference employee must be given thirty days advance written notice of the adverse action contemplated.[51] Where there is reasonable cause to believe he is guilty of a crime, he receives only such notice as is reasonable under the circumstances. The notice contains the reasons for the proposed action. He has a reasonable time to answer personally and in writing. His answer must be considered by the agency. If a decision is made adverse to him, he is notified in writing of the determination and of his right to appeal to the Civil Service Commission.[52]

The Commission does not consider appeals from loyalty hearings since the abolition of the Review Board. It will not

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[48] Removal—separation from the service on charges of delinquency or misconduct, or because the employee's capacity is not sufficient to justify his retention in the service.

[49] Suspension—a temporary non-pay status and absence from duty required by the appointing officer for disciplinary reasons or for other reasons pending inquiry.

[50] If a non-veteran is demoted, he is notified in writing of the reasons for the action and of his right to appeal through whatever grievance procedure the agency had adopted.

[51] The notice states what action will be taken under the proceeding. If on review the agency desires to take a more severe action, new charges must be issued and a new review is required. If the penalty imposed is less severe than the action proposed in the notice, a new proceeding is not necessary.

[52] If the employee accepted a reduction in rank on pressure from the agency, he has not waived his rights.

The agency must ascertain whether an employee is a preference eligible and treat his case accordingly. It is not excused by ignorance of his preferred state.

consider a case until the employee has exhausted any remedy his agency may have.

Within ten days after the effective date of the adverse action, or of the last adverse decision of an agency appeal, the preference eligible may appeal to the Commission in writing. He encloses the charges, the answer, the notice of adverse decision and any added documentary evidence he wishes to submit. He must include evidence of his preference status.

His documents are examined by the Chief, Appeals Examining Division, or by the Regional Director, if it is an appeal in the field, to see if the employee comes within the scope of the act. If it is decided he does not, he is informed of his right to request reconsideration and to submit evidence and arguments in support of his claim. If the decision again goes against him, he may appeal to the Commissioners on the point.

If he is within the Veterans' Preference Act, the case is docketed for investigation and adjudication. Investigation will be made as necessary. No pledge of confidence is made to witnesses. Evidence is discussed by the investigator with the administrative officer of the employing agency who made the adverse action against the employee and with other officers of the agency. They are requested to give their version of the dispute. The employee is informed of any data the agency may furnish and is allowed to insert his views on it. The agency may then comment on his comments and he on theirs.

The Civil Service Commission reviews both on the merits and the procedure. The employee may request a hearing. He may appear at this personally or through representatives. The agency also appears. Both sides may present evidence and witnesses. Testimony is given under oath. There is no subpoena power. If a transcript is not directed by the hearing examiner in charge, he summarizes his notes and the parties may take exception to any claimed inaccuracies in the summary.

The decision is made by the Chief, Appeals Examining Office, or by the Regional Director, depending on the location of the hearing. The determination includes an analysis of the evidence, a finding, the reasons for the finding, and a recommendation. The agency and the employee receive copies of

the decision. If it is adverse, the employee is notified of his further appeal rights.

Within seven days, an appeal may be made to the Board of Appeals and Review of the Commission. The Board reviews the record. In its discretion, it may allow the parties to appear personally and argue but there is no right to further hearing. Evidence which could have been previously submitted will not be considered. If new evidence appears, the Board may remand the case to begin the procedure again or, in exceptional cases and in its discretion, it may receive the evidence. An appeal may be taken to the Commission, at the Commission's discretion, with a personal appearance or written presentation. Under the Veterans Preference Act, the agency must take such corrective action as the Commission, at any of these appeal stages, recommends.

The Commission may examine the case of any separated worker to determine whether he is eligible for future government employ. Request must be made within six months of separation or within sixty days of the last adverse decision on appeal.

Fair Employment, Hatch Act

If the employee claims that he was or is being separated because of race, creed or national origin, he files a complaint within three months of personnel action with the supervisor of the Fair Employment Officer.[53] An attempt is made to settle the dispute at the supervisory level when possible. If for some reason this cannot be achieved, further complaint is made to the Deputy Fair Employment Officer who investigates and in turn attempts to adjust the grievance.

Unsettled complaints are taken to the Fair Employment Officer who makes his attempt at adjustment. If he, too, fails, the employee may be given a hearing. The Fair Employment Officer after hearing makes findings of fact and a decision. If the determination is unfavorable, further appeal is possible to the head of the department or agency.

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[53] An appeal is granted the applicant denied appointment because of race, creed or national origin. He files his complaint with the Fair Employment Officer.

From the agency, appeal may be taken to a Fair Employment Board in the Civil Service Commission. The Board can refuse to accept an appeal. If it takes the case, the employee is usually accorded a hearing. If new evidence appears, the case is remanded to the agency head for new determination.

The Commission does not allow duplicate appeals under the Fair Employment procedure and the Veterans Act. The Fair Employment procedure is available to all employees.

Under the Hatch Act, Federal employees are limited in the type of political activity in which they can participate. A government worker who violates this limit may be removed from his job and denied future government employ.

The employing agency and the Civil Service Commission make a joint investigation, unless either cannot do so. In the course of this investigation, the employee is given an opportunity to make a statement to the investigator in writing or personally and to furnish the names of witnesses to support his defense. If the case against him is founded on record evidence, investigation may be conducted by correspondence.

If the investigator finds evidence of a violation of the provisions of the Hatch Act, a proposed order is issued to the employee. This includes a statement of the charges and the information in support of them. The employee has fifteen days in which to answer.

He may request a hearing. It is within the discretion of the Civil Service Commission to grant or deny the request. Hearings are held before an examiner, in Washington unless otherwise specified. There is no subpoena power. The hearing is unilateral. Evidence in support of charges will not be given. Evidence gathered in the course of investigation is limited to voluntary disclosure and held in confidence. The employee may attempt to rebut the charges by his own testimony, by witnesses and by any evidence he may be able to produce. The counsel for the Commission may cross-examine the employee if he testifies, and any witnesses the employee presents.

A summary of the hearing is prepared by the employee or his representative and by the counsel for the Commission;

doubt is resolved by the Examiner. Either party may except to this summary. In the discretion of the Examiner, briefs may be submitted. The Commission decision is based on the entire record, the investigative file as well as the hearing. The final order contains a statement of the charges substantiated and the penalty if the decision is adverse.

The employee must be removed and barred from future employment in the Federal government unless the Commission by unanimous vote authorizes a lesser penalty. In practice, the Commission rarely invokes this removal power. As a minimum in an adverse decision, it must suspend without pay for at least 90 days. The Commission may treat the matter from a suitability view and establish a limited period in which the employee is barred from Federal position.

If the employee is in a position excepted from the classified civil service, the Commission may clear his record for future employment but it cannot require the agency to reemploy him.

Reduction in Force

In fiscal year 1953, there was a reduction in Federal personnel of 116,700; in 1954, over 150,000. In "reduction in force" due effect must be given by statutory direction to length of service,[54] to efficiency,[55] and to military preference.[56] The employee is assigned a tenure status on these criteria. When he is notified of a proposed adverse action under R.I.F., as it is known, he may examine the registry of tenure status and the records bearing on the determination of that status. Generally, appeal rights are granted within the agency. Further, an employee who believes that the regulations are not, in some way, being correctly applied may appeal to the proper branch

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[54] Military service is included.

[55] Each agency must have a performance rating system. Each agency also has a board of review of the rating. One member is chosen by the employing unit, one by the employee, and a chairman is furnished by the Civil Service Commission.

[56] Preference employees with an efficiency rating of "good" or better have retention preference over all other competing employees without regard to length of service. Those with rating below good are retained ahead of competing non-preference employees having equal or lower rating.

of the Civil Service Commission.[57] From this division, another appeal may be made to the Commissioners.

Courts have uniformly upheld the concept that the power to remove is incident to the power to appoint, except for any statutory limitations. If the statutory minima are met, a court will not examine the merits of the case. Allegations of arbitrariness must be so clearly established as to show the action was malicious and in bad faith. Procedural defects, however, will be reviewed.

Departmental Appeals

Over and above these minima, the agencies may provide what intradepartmental appeals they desire. Large agencies have elaborate procedures with many levels of appeal.[58]

The Post Office Department has different proceedings for different personnel actions. If the employee has a grievance he takes it up with his supervisor. If the grievance is not settled at this stage, it may be heard in turn by the next supervisor, the unit head, a hearing board and a review hearing board, the Bureau head, a department Board of Appeals and the Postmaster General. A settlement at any stage would, of course, stop further processing. Separation procedures follow the civil service minimum. It is not clear whether the employee against whom separation proceedings have been brought may avail himself of the greater protection of the grievance system.

The Army also maintains grievance and separation procedures; the grievance procedures are available in separation cases. The employee is given a hearing at the local level and a recommendation is made to the commanding officer. If he makes an adverse decision, the worker may pursue review through successively higher echelons of appeal, up to a Board in the Office of the Secretary of the Army.

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[57] When an employee cannot be removed without undue interruption to the work, he may be retained ahead of those with a higher status. Employees affected adversely by this have the right to notice and to appeal to the Civil Service Commission.

[58] Some do not. In reply to inquiry, the Justice Department stated simply that an employee may file appeal to the Attorney General. Emphasis is placed on complete investigation before removal proceed-

The Veterans Administration has a consolidated procedure for separation, disciplinary action, grievance, performance ratings and discrimination. All issues are to be aired in one proceeding. An issue which was raised or which could have been raised cannot be made the subject of a future grievance proceeding. All grievances are, when possible, to be settled at the supervisory level. If this cannot be done, the employee may request a hearing before an agency board. The Manager of the station or the Assistant Administrator at the Central Office make nominations for the hearing panel and the members of the panel are selected by the employees. No Assistant Manager or personnel officer is eligible. Each panel has the aid of an Executive Secretary from the Personnel Office who arranges hearings and advises the Board. The Administration chooses a member from the panel, the employee chooses a member, and these pick the third to serve as Chairman. If they cannot agree on a choice, he is chosen by lot from the remaining members of the panel. Hearing is usually held at the place of employment. Hearing is on government time. The employee and his representative, if the latter is also a VA employee, may prepare the case during working hours.

Hearings follow the usual administrative pattern. In removal cases, the supervisory officer presents evidence in support of the allegations of the original notice. The employee may rebut. The recommendation of the Board is based solely on the hearing. The Assistant Administrator of the station makes the decision. Appeal to the Administrator is possible.

Appeal cannot be had simultaneously under Civil Service and this procedure. Issues raised before the Civil Service Commission cannot be readjudicated under the VA process.

Summary Comparison of Security and Other Procedures

Neither the Civil Service removal nor the Security program requires that an applicant be given charges. Under Civil Service, the temporary employee may be separated at any time. The probationary worker receives the reasons for his discharge but opportunity to answer is in the discretion of the employing agency. Temporary and probational employees

receive, under Executive Order 10450, both charges and the opportunity to reply to the charges.

The employee, past probation and serving under a permanent or indefinite appointment, has, under civil service, a right to charges and an opportunity to answer. Only the preference eligible is entitled to a hearing. Under security regulations, this class of employee has a right to a hearing regardless of veterans' preference. Preference eligibles have, in removal cases, an appeal to the Commission. Other employees have limited appeal privileges. Agency decision is final in security cases for all employees.

On the whole, the agencies have granted in their security regulations few procedural rights beyond the minima set by Public Law 733. In Civil Service removals, the agencies have gone far beyond the requirements of the Acts and the Civil Service regulations.

The security regulations, in sticking close to the requirements of the Act, remain close to each other. Non-security separation procedures vary widely among the agencies.

In separation proceedings other than political activity cases, there is little use made of confidential information. The employee receives detailed charges. Cases have required that these be far more specific than those found in security proceedings. Separation is based on the charges made and proved, not on undisclosed information in the personnel file.

S. W.

VI. UNANSWERED QUESTIONS

A formal description of the statutes, executive orders, and regulations raises more questions than it answers. It may be desirable to suggest some of the matters that this memorandum leaves almost unexplored and entirely unresolved. Herewith not just twenty questions, but twenty clusters of questions.

1. Is the security-risk concept properly applicable to all government employees? To all military men? To all maritime workers? That is, do these employees, by reason of their employment, invariably raise a potential security threat?

2. In programs confined to employees with access to classi-

Defense and AEC contractors, are the limits too broad or too narrow? On the one hand, are the standards for classifying security material too inclusive to serve as a guide for employment tests? On the other, are there areas of private employment that in fact conceal substantial hazards to security even though no classified material is involved? The Department of Defense urges that such areas exist.

3. Are the criteria that define the necessarily general standards sufficiently precise and meaningful? Do they make sufficient allowance for the situation of the individual employee, his capacity for injury, his capacity to avoid injury?

4. Of great importance, how competent are the investigative agencies? Do they ask the right questions? Report the answers accurately? Overstress derogatory information? Make reliable evaluations of information from undisclosed informants?

5. Of equal importance, what kinds of information are considered derogatory? Do the charges that are made reasonably relate to the criteria? Are they overweighted with remote associations and affiliations, with elusive elements of opinion and sympathy? Do they force the employee to rebut trivial or baseless accusations?

6. What are the effective standards of evaluation by security officers? Do they establish unduly severe standards for applicants and others who are not entitled to a hearing?

7. Can and do security officers bring pressure to bear on employees to resign without availing themselves of the opportunity to make a defense?

8. Security officers often have power to deny clearance for access to classified material, without charges or hearing. When such access is essential for the employee's usefulness, does the use of this power circumvent the established procedures? What standards guide its use? Should the employee have an opportunity to challenge the denial?

9. Can one describe the effective standards used by hearing boards and reviewing officials? Do the actual grounds for decision meet the prescribed standards? Does the process throw

but of establishing an affirmative case as to his loyalty and discretion?

10. If this is so, is it a reasonable burden to impose? Does the hearing process open up unnecessary or improper inquiries into the employee's private life, private opinions, and private beliefs?

11 The hearing and review balance the investigative report against the employee's sworn defense. Is adequate allowance made for the ex parte, unsworn, untested, and undisclosed elements of the investigative report? Is a hearing a hearing at all when the employee cannot confront the witnesses against him, or even be apprised of their evidence?

12. Is the burden of financing his defense a fair handicap to impose on the employee?

13. His burden is increased by the consistent practice in most programs of suspension without pay pending adjudication. Is this tactic a necessary security safeguard? Is it used to increase the pressure to resign?

14. What do comparisons of actual practice in security proceedings and ordinary civil service removal proceedings disclose as to the relative care and fairness of the two types? Are they properly comparable? Should security proceedings be more arbitrary, because of the risk to the government, or less, because of the stigma attached to an adverse decision?

15. Is the security program encroaching on normal civil service standards of suitability? Should questions of stability, criminal records, and sexual habits be intermingled with questions of loyalty? Should they be treated as security matters at all? Is there a demonstrable case that the homosexual, for example, is a special security risk, in or out of sensitive positions?

16. Does the inclusion of such cases in reports of the programs overstate or misstate the total hazard? Divert attention from the pursuit of direct counterespionage, countersabotage, and counterrevolutionary safeguards?

17. How far is it reasonable to demand the cooperation of every employee in laying bare his own history, associations and opinions? When are misstatements by the employee material to either security or suitability, and when are they seized

upon as a substitute for judgment on the merits? Similarly, with refusals to answer. Is any allowance to be made for claims of conscience or of constitutional privileges? Is the threat of criminal punishment for falsehoods a reasonable sanction, or an invitation to entrapment?

18. With regard to conscripts, who are involuntarily exposed to security tests, is it proper to condition their status on the fullness of their disclosures in a loyalty statement? To effect discharges under other than honorable conditions for past association and activities not part of military service? To foreclose promotion, and recognition of professional status (as with doctors) on like grounds?

19. With regard to maritime and other private employment, may government exclude citizens from the pursuit of common callings on security grounds, without affording them full due process of law? Do the present procedures meet the tests of due process?

20. Outside of especially sensitive areas, are the programs in action really directed to security, or are they loyalty programs? If the latter, do they penalize the concededly disloyal, the possibly disloyal, or the non-conformist? For which of these classes is loss of employment a deprivation that a democratic government can lawfully impose?

R. S. B.

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VII. SELECTED REFERENCES

Statutes

37 Stat. 555 as amended 62 Stat. 354, 5 USC § 652—The Lloyd-LaFollette Act on separation of civil servants for cause.

58 Stat. 390, amended 61 Stat. 723, 5 USC § 863—The Veterans Preference Act, including section 14 on separation of preference eligibles.

53 Stat. 1148, 5 USC § 118J (1939)—Section 9A of the Hatch Act which forbids a government employee to be a member of a group which advocates the overthrow of the government by force or violence.

64 Stat. 476, 5 USC § 22-1 (1950)—Public Law 733, the summary dismissal statute on which Executive Order 10450 is based.

68 Stat. 919 (1954)—The Atomic Energy Act, as amended.

64 Stat. 427, 50 USC § 191 (1952 supp.)—The Magnuson Act which underlies the Port Security Program.
66 Stat. 44, 5 USC § 655 (1952)—Transfer of investigation functions from the FBI to the CSC.
64 Stat. 828, amended 67 Stat. 88, amended P. L. 403, 83d Cong. 2d Sess., 6-18-54—The Doctors' Draft Law.

Executive Orders

9835, March 21, 1947—The Truman Loyalty Program.
10450, April 27, 1953—The Eisenhower security program.
10491, October 13, 1953—Addition of refusal to testify as security criterion.
10548, August 4, 1954—Rewording of criterion.
10422, as amended by EO 10459—United States program on the loyalty of United Nations' employees.
10173, October 20, 1953—Port Security.
10180, November 13, 1950—Decreeing non-permanent appointments for Civil Service.

Hearings

Committee on Armed Services, Senate, 83rd Cong. 2d Sess. March 18, 24, April 1 and 8, 1954. Hearings on the Doctors Draft Amendment.
Committee on Armed Services, Senate, 83rd Cong. 2d Sess. July 15, 1954. Armed Services Security Cases.
Subcommittee of the Committee on Appropriations, House 83rd Cong. 2d Sess.
Committee on Appropriations, Senate, 83rd Cong. 2d Sess. April 20, 1954.

Civilian Employees Security Regulations

Sample Security Regulations—April 23, 1953.
Veterans Administration—Transmittal Sheet 20—July 2 1953.
Post Office—Order 55372—September 18, 1953.
Health—Regulations relating to the Security Program—September 24, 1953.
State—Manual of Regulations and Procedure, Vol. I—Administrative Operations, Transmittal Letter RP-79—July 2 1953.
Treasury—Rules to Govern the Personnel Security Program—September 22, 1953.
Attorney General—Order No. 25-53—August 31, 1953.
Department of Defense Directive 5210.7—August 12, 1953.
SR620-220-1—Army—December 18, 1953.

NOPI-29—Navy—November 9, 1953.
AFR 40-12—Air Force—October 16, 1953.

Security Regulations—Military Personnel

Department of Defense Directive 5210.9—April 7, 1954.
AR 605-200—Army—June 18, 1954.
Sec. Nav. Instruction 5521.6—Navy—June 23, 1954.
AFR 35-62—Air Force—June 23, 1954.

Other Regulations

10 CFR Part 4—The Atomic Energy clearance program.
33 CFR Part 121—The Coast Guard Port Security Regulations.
Department of Defense, Industrial Personnel and Facility Security Clearance Program—May 4, 1953.
Civil Service Manual.
Order No. 16112, August 22, 1941—the Post Office Grievance Procedure.
39 CFR sec. 135—the Post Office Separation procedure.
Veterans Administration Manual 5-2—Personnel Administration.

Other Forms

Department of Defense DD 98—Loyalty certificate for servicemen.
Department of the Army DA 1111—Certificate of Nonaffiliation with Certain Organizations.
Civil Service Commission Form 57—the standard application blank for Federal government employment.